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No.

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1996

MICHAELINA ORTIZ,
Petitioner,

vs.

JOHN O. BUTLER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the District Court's entry of summary judgment for the Defendant on the basis of mootness, as there were triable issues of fact as to Defendant's liability, and the damages to be recovered by Plaintiff at trial, and with respect to Plainitff's entitlement to Punitive damages, the District Court, and in turn the Court of Appeals, had incorrectly applied an erroneous and overly narrow legal standard embodied in Illinois rather than Federal law, in contravention of Plaintiff's right to a jury trial on the merits pursuant to Title VII, to the facts of this case, thereby rendering moot by judicial fiat a live case and controversy.

TABLE OF CONTENTS

I. TABLE OF CONTENTS ii

II. QUESTION PRESENTED.....i

III. TABLE OF AUTHORITIES.....iii

IV.OPINION BELOW.....1

V. JURISDICTION.....1

VI. CONSTITUTIONAL PROVISIONS INVOLVED..2

VII. STATEMENT OF THE CASE 2-6

VIII. REASONS FOR GRANTING THE WRIT.....14

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IX. APPENDIX.....1A

TABLE OF AUTHORITIES

Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, (C.A.7 (Ill.) 1995)

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed.

Hiatt v. Rockwell International 26 F. 3d 761 (7th Cir. 1994).

Hudson v. Soft Sheen Products, 873 F. Supp. 132, 136 (N.D. Ill. 1995).

Jackson v. Bunge Corporation 40 F. 3d 239, 246 (7th Cir. 1994)

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975).

Lenard v. Argento, 699 F.2d 874, 897 (7th Cir.1983).

McDonnell Douglas Corp. v. Green 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir.1982).

Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983)

Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508, (7th Circuit, 1986)

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The Petitioner Michaelina Ortiz respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on September 9, 1996, affirming the Trial Court's grant of Summary Judgment to Defendant John O. Butler Company.

OPINION BELOW

The Order and Opinion of the Court of Appeals appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit, affirming the District Court's order entering Summary Judgment in Defendant's favor, dated July 6, 1996, was entered on the Ninth Day of September, 1996. The jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights of 1991, 42 U.S.C. Section 2000(e),et seq., and 28 U.S. C. 1291.The basis of the trial court's jurisdiction was under Title VII of the Civil Rights Act of 1991, 42 U.S.C., Section 2000(e), et seq., and 28 U.S.C. 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the Seventh Amendment to the Constitution of the United States appears in the appendix hereto.

STATEMENT OF THE CASE

Plaintiff Micaelina Ortiz filed her complaint on February 23, 1993. The complaint alleged that Plaintiff had been wrongfully terminated by Defendant in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 et seq., and had been the victim of retaliatory discharge by Defendant, in violation of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. Section 2000(e), et seq. [Record on Appeal, Volume 1, number 1, hereafter, (R 1-1).

Defendant John O. Butler Company is a manufacturer and distributor of oral hygiene products, such as toothbrushes and dental floss.(R 2-18, p. 2)

Defendant employs approximately 500 people. (R 2-18, p. 3).

Plaintiff Micaelina Ortiz was employed by Defendant rom February 17, 1983 until her termination on April 6, 1992. (Id.) Ms. Ortiz was first hired as an assembler. (Id.) Thereafter she worked in various positions in Defendant's Production Department, until her transfer to the Molding Department in April 1990, where she worked as a first shift molding operator until her termination. (Id). Ms. Ortiz is a Mexican immigrant and a permanent resident of the United States, and is not a fluent English speaker. (R 1 22, p. 2) This makes her typical of the workers Defendant uses to staff its Molding Department, most of whom are Hispanic immigrants, who speak English with only marginal proficiency.(Id. , R 2-18, p. 39).The Molding Department is not unionized, and Defendant's management vigorously and successfully resisted efforts to organize a union.(R 1-23, p. 6,7).Ms. Ortiz alleged in her complaint that she was terminated for complaints she had made regarding the working conditions at Butler, and because of her age. (R 1-38, p. 2, R 23 p.1). Ms. Ortiz alleged that during the tenure of her employment by Defendant, she was sexually harrassed by Frank Williams, her immediate supervisor. (Id.) This harassment took the form of lewd or suggestive remarks which he made on a daily basis; these unwelcome comments were sometimes accompanied by Williams physically touching her on the back, buttocks or thigh as she bent over a molding machine(Id. at 3,R 1 23, p1).

Ms. Ortiz further alleged that while she did nothing to encourage this behavior, she responded to the behavior by trying to ignore it: since she was afraid to directly confront Williams because he was her superior, and she was therefore afraid to openly confront him and forcefully tell him to stop. (Id. at 2). Her lack of receptiveness to the advances led Williams to reassign Ortiz from her position as machine operator to that of material handler, which involved more difficult physical work.(Id.) Such a move was regarded by machine operators as undesirable.(Id.).

Ms. Ortiz also alleged that Earl Phillips, her group leader, would belittle, threaten, and intimidate workers by raising his voice, using foul language, making derogatory ethnic remarks, engaging in name calling, and by making threats.(Id.) At times, Phillips would respond to employee's complaints with ethnic slurs which insulted the worker's Mexican national origin.(Id at 3). Phillips's large size and loud voice made his threats and intimidation all the more frightening. (Id.).

On a number of occasions, Ortiz and other employees complained to Williams(Williams was Phillips' superior) about Philips' attitude toward the employees in the molding department.(Id). These complaints were without any apparent effect. (Id). Accordingly, the molding department employees agreed among themselves that Williams would not, or could not get Phillips to change his behavior.(Id.).

In addition to apparently ignoring the complaints about Phillips directed to Williams, both Williams and Phillips actively

discouraged employees from complaining to the personnel department. (Id. at 4). In fact, at one point Phillips told Ortiz that employees who complained too much to the personnel department would get fired.(Id.)

In October, 1991 the employees, led by Laura Kaminski, asked Williams and Phillips to organize a meeting between the molding shop employees and management, in order to discuss working conditions and air their grievances.(Id.) Williams delayed and equivocated. After the passage of some time he told the workers that the meeting would take place after Thanksgiving, only later to tell them that it would take place after Christmas. (Id.) This pattern of delay led the workers to believe that management would never hear the employee's grievances, so long as they relied on Williams or Phillips to arrange the meeting. (Id.)

In January of 1992 Ms. Ortiz was approached at work by Laura Kaminski and Juanita Soto. (Id.) They discussed how the working conditions at the molding department were becoming intolerable, as a result of Phillips abusive comments, and Williams' sexual harassment.(Id.) Kaminski and Soto suggested that someone should write a letter to the personnel department, describing the supervisors' behavior.(Id.). Kaminski and Soto told Ortiz that they were planning to write such a letter, and asked Ortiz if she would sign it. (Id.). Ortiz replied that although she though that the letter was a good idea, she was worried about losing her job, and afraid of Phillips reaction, making her reluctant to sign the letter, unless everyone in the

department were to sign it.(Id. at 4, 5). In the following weeks, a number of the employees of the molding department discussed the possibility of sending such a letter to the personnel department. (Id. at 5). The consensus reached by the employees was that while sending a letter to the personnel department was a good idea, no one wanted to take the risk of being fired for signing it.(Id.).

After their first conversation, Kaminski approached Ortiz and showed her a letter she and her husband had written. Kaminski told Ortiz that this was sent anonymously, because too many people were afraid of signing it. Kaminski asked Ortiz to write another letter, since in Kaminski's opinion, if two letters were sent, the problems in the molding department would be taken more seriously by management.(Id.).

Ortiz then got together with Juana Soto, Luis Mejia at the house of a former Butler employee, Theresa Perez, and listed all of their complaints about the working conditions in the molding department.(Id.) Ortiz actively participated in the discussion. At the conclusion of their meeting, Theresa Perez wrote a letter containing their complaints, and mailed it to the Butler company. (Id. at 5,6). This was the handwritten letter in issue in this case.(Id.). Ortiz had not asked anyone to sign this letter, nor did she relate to others what had been done.(Id. at 6).

Ms. Ortiz had hoped that upon receipt of the letters, the personnel department would make an investigation into the complaints, and carefully observe Williams and Phillips. Ortiz was certain that if such an investigation were made, the

personnel department would catch Williams and Phillips, and then discipline them.(Id.).The letters were received, and Butler's management decided that the company should conduct an audit of the Molding Department personnel to investigate the complaints made in the two letters. (R 1-38, p. 3). This audit consisted of Susan Bondy, Defendant's Director of Human Resources, conducting individual employee interviews, whereby the interviewer would ask questions about the employee's work environment. (Id.) During the course of Ms. Ortiz's first interview, Ms Ortiz stated that she had not heard anyone in management use foul language, or make sexual comments.(Id.) At a later interview, Ms. Ortiz denied that she was involved in the drafting of either of the two letters. (Id.) Further, during the course of the deposition taken in furtherance of the instant proceedings, Ms. Ortiz denied having taken part in the drafting of either letter.(Id.)

Kaminski told Ortiz that Phillips was extremely angry about the complaints contained in the letters, and that he had said that he knew Ortiz was behind them.(Id.). The fact that Phillips knew about the letters led Ortiz to believe that the personnel department and the molding department supervisors were on the same side, and that the employee's complaints would not be supported. (Id.) Accordingly, Ortiz believed that the interviews the personnel department was conducting were being made for the purpose of determining who wrote the letters, and not to investigate the complaints contained in the letters.(Id.)

At the time, Ortiz believed that she would be fired if it appreared that she was involved in the complaints, so that when she was interviewed on March 19, 1992 by Mr. Spangler and Ms. Bondy of the personnel department, Ortiz did not discuss with them her problems with Williams and Phillips.(Id. at 7).

Ortiz continued to deny her participation in writing the letter at the meeting in which she was notified of her suspension, because she believed that she would be fired if she admitted her role.(Id.). In addition, Ortiz was fearful of what Phillips would do to her if she admitted that she had complained against him.(Id.) Williams was present at the meeting regarding her suspension, and Ortiz therefore felt intimidated, and perceived Williams, Spangler and Bondy to be on the same side. She believed that the suspension was a trick to get her to admit that she was involved.That is why she demanded to know who had told them that she was spreading lies about the supervisors.(Id.)

In her affidavit, Ms. Ortiz stated that she did not then offer to tell Bondy and Spangler who wrote the letters, nor did she say, as Spangler asserted, that she thought that the second shift was out to get her.(Id.) At the March 25, 1992 meeting with Spangler and Bondy, Ms. Ortiz was confronted with the letters.(Id.) Bondy and Spangler told her that five people had told them that Ortiz wrote a letter.(Id.)Fearing that she would be fired, Ortiz denied her involvement in writing the letter.(Id. at 7, 8).

In her affidavit, Ms. Ortiz stated that she was confused during her April 6, 1992 termination meeting.(Id. at 8). Adding to her confusion was the fact that the personnel department employee assigned to translate for her was not doing a very god job, leading Ms. Ortiz to have trouble understanding what was being said.(Id.).

Throughout the course of the meeting Ortiz continued to believe that she would be fired for admitting her involvement in the letter writing, so she therefore continued tosteadfastly deny her participation.(Id.).After the audit was completed, Butler accused Ortiz of intentionally and maliciously creating and disseminating false claims of sexual harassment. (R 1-38, p. 4) Defendant had suspended all the employees it believed were involved in the alleged creation of the falsehoods, except for Ortiz, who was terminated on April 6, 1992. (Id.). Ortiz, who was forty four years old during the events in issue, claimed that the reason she was terminated, while other younger employees accused of the same conduct were merely suspended and demoted, was because of her age.(Id.)

DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT

On October 25, 1993 Defendant filed its first Motion for Summary Judgment.(R 1-11). In its motion Defendant argued that there was no material issue of fact as to Ms. Ortiz having established a prima facie case of retaliatory discharge, thereby entitling Defendant to Summary Judgment as to Count I. (Id. at 2). Defendant made a parallel argument that Ms. Ortiz had

failed to establish a prima facie case of age discrimination, thereby entitling Defendant to Summary Judgment as to Count II. (Id. at 2, 3).

In its Memorandum Opinion and Order of May 26, 1994 the Trial Court denied Defendant's Motion for Summary Judgment with respect to Count I of Plaintiff's complaint.(R 1-38). The Trial Court held that the evidence before it showed that Plaintiff had established a prima facie case of retaliatory discharge in violation of Title VII, in that 1) she engaged in statutorily protected opposition, 2) she suffered adverse action by Butler, and 3) that there was a causal link between Plaintiff's oppoisition and the adverse employment action. The court observed that in order for the plaintiff's expression to be statutorily protected, the practice challenged by Plaintiff need not actually violate Title VII, instead, it was sufficient that the plaintiff has a reasonable belief that she is challenging conduct violative of Title VII. (Id. at 6).

The Trial Court held that the evidence in this case showed that Ms. Ortiz was first suspended, and then later terminated, at least in part, because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors: Defendant's management had concluded that plaintiff was clearly involved in disseminating what they believed to be false claims regarding Williams and Phillips, based on the fact that so many other employees had identified plaintiff as someone who either had asked them to sign one of the letters describing the allegedly hostile work

environment at Butler, or who had written one of the letters.(Id. at 7).

The Trial Court found that as a result of this conclusion on the part of Defendant's management, Plaintiff was notified that she was suspended for one day and demoted to a job in the production department with less pay "for making false statements and accusations with malicious intent." The Court further found that Plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harrassment, and because of her purported failure to accept responsibility for her behavior. (Id.) The Trial Court further found that entry of summary judgment was not warranted because Plaintiff had established a prima facie case of retaliatory discharge, because Defendant admitted that it believed that Ortiz had complained of sexual harassment and acted on this belief when suspending and terminating her. (Id. at 7, 8). The Trial Court noted that the majority of courtscharged with interpreting Title VII have been willing to construe the applicable sections of Title VII broadly, in order not to frustrate the statute's purpose, which is to "prevent fear of economic retaliation from inducing employees 'quitely to accept[unlawful] conditions.'" (Id. at 9). The Trial Court accordingly found that the phrase in Section 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to

sexual harassment. (Id. at 10).

The Trial Court further found that Ortiz had presented evidence to the court, in the form of her affidavit and the affidavit of her co-worker, Marie Robles, that indicated that Ortiz's supervisors may have actually engaged in sexually harassing behavior, a genuine issue of fact existed as to whether Ortiz had intentionally and maliciously filed baseless charges of sexual harassment agains her supervisors(as Defendant had argued), it could not rule as a matter of law that Ortiz had failed to prove a prima facie case of retaliatory discharge.(Id. at 11).

The Trial Court also found that the reasons articulated by Defendant for Ortiz's discharge were not a pretext for age discrimination, and that Defendant was therefore entitled to a grant of summary judgement as to Ortiz's claim of age discrimination st forth in Count II of her Complaint (Id. 14).

DEFENDANT'S MOTIONS FOR RECONSIDERATION

Defendant moved on three separate occasions for the Trial Court to reconsider its denial of Defendant's Summary Judgment Motion.(R 1-40, 1-43). Defendant's first Motion for Reconsideration was premised on Defendant's contention that Defendant had demonstrated, as a matter of law, that Plaintiff had "intentionally and maliciously filed baseless charges against her supervisors." R 1-40. On June 10, 1994 the Trial Court entered its Order denying said Motion. In reaching its decision, the Trial Court held as follows:

> What defendant fails to recognize, however, is

> defendant's belief about plaintiff's charges may be different than the truth regarding these charges.Whether plaintiff in fact filed baseless charges is still in dispute in this case. . . .The court finds that a factual dispute exists regarding whether or not plaintiff intentionally and and maliciously filed baseless charges of sexual harassment against her supervisors, making summary judgment in favor of defendant onCount I inappropriate. Order, June 10, 1994, (R-141).

On February 14, 1995 Plaintiff's attorney presented his motion to withdraw as attorney of record for plaintiff; said Motion was denied on that date.(R 1-53). On March 7, 1995 the final pre-trial conference was held and the final pre-trial order was filed. (R 1-55, 56) .

DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

On April 28, 1994 Defendant filed its second Motion for Summary Judgment.(R 2-63). In this motion Defendant maintained that it was entitled to a judgment as a matter of law, because based upon the uncontradicted facts of record in the cause, there were no issues of material fact as to the relief to which the plaintiff was entitled, since, according to Defendant, Plaintiff's own supplemental statement of damages incorporated into the Final Pretrial Order entered by the Court on March 7, 1994, showed that Plaintiff had received all the relief to which she could be entitled, and that accordingly Plaintiff's lawsuit sought no redressable injury, and no case or controversy existed, thereby rendering Plaintiff's claim

moot.(Id.).

The Trial Court granted Defendant's second motion for summary judgment.(R 2-13). In reaching its decision, the Trial Court stated that it had relied on Plaintiff's Supplemental Damage Statement to the Final Pretrial Order, which identified the following damages that Plaintiff was entitled to recover from Defendant: lost wages and benefits of $15,350.00, which was offset by a settlement of Plaintiff's NLRB claim, in the amount of $16,000, resulting in damages as and for lost wages and benefits in a negative amount -$649.60; increase in burden of proof" of $100,000; punitive damages in the amount of $300,000. The Trial Court also found that as a matter of law, Plaintiff was not entitled to Punitive damages.(R 2-13).Plaintiff filed her pro-se Notice of Appeal from the judgment entered by the Trial Court on August 1, 1995.(R 1-78). On September 9, 1996 the Court of Appeals affirmed the Trial Court's Judgment.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in affirming the District Court's entry of summary judgment for the Defendant on the basis of mootness, as there were triable issues of fact as to Defendant's liability, and the damages to be recovered by Plaintiff at trial, and with respect to Plainitff's entitlement to Punitive damages, the District Court, and in turn the Court of Appeals, had incorrectly applied an erroneous legal standard embodied in Illinois rather than Federal law, in contravention of Title VII, to the facts of this case, thereby rendering moot by judicial fiat a live case and controversy.

Petitioner respectfully submits that the affirmance by the Court of Appeals of the Trial Court's determination that Plaintiff's case was moot and that under no circumstances would Plaintiff be able to go forward to the jury on her claim

for damages arising out of her employer's retaliatory conduct in violation of Title VII was in error, as the Trial Court had ignored those elements of compensatory damages which a Title VII claimant is entitled to seek as of right, and improperly based its determination that Plaintiff was not entitled to present to the jury her claim for punitive damages on an application of Illinois, rather than Federal case law, which served to deprive Plaintiff of her right to a trial by jury, as set forth by the statutory enactments governing Title VII, which extend to a claimant a right to a trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States.

Title VII makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice by [Title VII]." McDonnell Douglas Corp. v. Green 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff need not succeed on her sexual harassment claim to make out a prima facie case of retaliatory discharge. Instead, it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct that violates Title VII., as it is the employee's good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir.1982).

The Trial Court made a specific finding in its denial of Defendant's First Motion for Summary Judgment, directed at Count I of the Complaint that the evidence in this case showed that Ms. Ortiz was first suspended, and then later terminated, at

least in part, because Defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors. Defendant's management had concluded that plaintiff was clearly involved in disseminating what they believed to be false claims regarding Williams and Phillips.(Id. at 7).

The Trial Court found that as a result of this conclusion on the part of Defendant's management, Plaintiff was notified that she was suspended and demoted with less pay "for making false statements and accusations with malicious intent;" the Trial Court further found that Plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harrassment, and because of her purported failure to accept responsibility for her behavior. (Id.)

The Trial Court found that even if Plaintiff did not write or disseminate the letters complaining about sexual harassment at Butler, Plaintiff was nevertheless still able to establish a prima facie case of retaliatory discharge, precisely because Defendant admitted that it believed that Ortiz had complained of sexual harassment and acted on this belief when suspending and terminating her. (Id. at 7, 8).

The Trial Court found that the phrase in Section 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to sexual harassment. (Id. at

10).The above findings are the law of the case with respect the liability issues.These findings were adopted by the Parties in their Joint Statement of Uncontested Facts contained in the Pre-Trial Order and should be seen as controlling with respect to the liability issues.(R 4-56): Joint Pretrial Order, Statement of Uncontested Facts, Paragraph 87, citing Memorandum Opinion and Order of Judge Holderman, dated May 26, 1994, pages 7, 13). These findings show that Plaintiff had a viable claim against her employer on the underlying issue of her employer's violation of Title VII.

The evidence of record presented adequate and sufficient evidence that Plaintiff was entitled to an award of compensatory and punitive damages, rendering her claim far from moot. Plaintiff respectfully submits that the Trial Court was therefore in error in granting summary judgment when viable triable issues of fact existed.

In granting Defendant's Second Summary Judgment Motion, the Trial Court determined that the record before it showed that there were no triable issues of fact, since Ortiz had no redressable injury, her claim was moot and therefore subject to dismissal.(R 2-73, p. 9). The Trial Court based its determination that there were no triable issues of fact relative to damages on Plaintiff's Supplemental Damage Statement to the Final Pretrial Order, which included lost wages and benefits of $15,350.00 increase in burden of proof" of $100,000; and punitive damages in the amount of $300,000.

The Trial Court focused on the above elements of damages,

in reaching its decision that no material issue of fact existed as to the damages that could be awarded to Ms. Ortiz. Yet the Trial Court apparently overlooked those elements of damages in a Title VII case which are available pursuant to statute, and therefore need not be specifically set forth in a Pretrial Order, and are accordingly not waived thereby, as well those elements of damages which were included in the original Damage Statement, which were later supplemented by Plaintiff's Supplemental Damage Statement, as well as those elements of damages which were set forth in Plaintiff's proposed jury instructions, which were appended to, and made a part of the Joint Pretrial Order.

It is well settled that a plaintiff is not required to itemize his damages claims in his complaint; to the contrary, Federal Rule 54(c) entitles him to a judgment that grants him the relief to which he is entitled even if the complaint failed to ask for that relief. Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, (C.A.7 (Ill.) 1995) Federal Rule of Civil Procedure 9(g) does require that the complaint plead "special damage," which consists of those damages that are unusual for the type of claim in question however,the governing statute entitles the plaintiff to recover damages for the full consequences of the discharge including emotional distress.

Plaintiff's initial Statement of Damages set forth the following elements of damages: lost wages(back and front pay), lost benefits, out-of pocket pecuniary losses, attorneys fees and court costs, and punitive damages, without setting forth any

specific dollar figure for said damages. (Final Pre-Trial Order, Exhibit N). In addition, Plaintiff's proposed jury instructions relative to damages did describe with particularity the compensatory damages available to Plaintiff under Title VII which were to be considered by the jury, including damages for emotional pain and suffering.(Final Pretrial Order, Exhibit S, Plaintiff's Jury Instruction 8) No reason exists why a claimant Under Title VII should be required to set forth any particularized listing of damages in a pretrial order, which is required when a party claims special damages as it should be sufficient,consistent with the rule in antitrust cases, that the plaintiff need only demonstrate a "just and reasonable estimate" of his damages. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed.

In its Opinion and Order affirming the Trial Court's Decision, the Court of Appeals has deemed that Plaintiff waived consideration of those elements of damages set forth above, as they had not been specifically discussed in Plaintiff's response to the Pre-Trial Order. Plaintiff submits that the waiver doctrine should not be extended to such an extent that it allows a reviewing court to ignore statutory provisions which would ordinarily be subject to judicial notice.

In its first Memorandum Opinion and Order, The Trial Court made a specific finding that Ortiz had presented evidence to the court, in the form of her affidavit and the affidavit of her co-worker, Marie Robles, that showed that Ortiz's supervisors may have actually engaged in sexually harassing behavior, and

therefore, a genuine issue of fact existed as to whether Ortiz had intentionally and maliciously filed baseless charges of sexual harassment against her supervisors(as Defendant had argued). The Trial Court therefore found that it could not rule as a matter of law that Ortiz had failed to prove a prima facie case of retaliatory discharge.(Id. at 11).Yet in considering the issue of punitive damages pursuant to Defendant's Second Summary Judgment Motion, the Trial Court reached a diametrically different result, although none of the salient facts had changed in the interim. In evaluating Defendant's claim that there was no issue of fact as to a possible award of punitive damages, the Trial Court concluded that in the instant case, Ms. Ortiz had failed to present any evidence that Butler terminated Ms. Ortiz's employment either with actual malice or with reckless indifference to the Plaintiff's rights. (Id.).

The Trial Court based these findings in turn on its conclusion that the management's audit had been conducted fairly, and that during the audit, the employees, including plaintiff, not only did not confirm the allegations of discrimination contained in the letters, but actually denied the allegations. (Id.)

This led the Trial Court to determine, as a matter of law that Plaintiff had presented no evidence indicating that Defendant's management efforts to investigate the allegations of sexual harassment were a sham, or that management had actual knowledge of any sexual harassment by personnel in the Molding Department.(Id.)Yet whatever management's state of

mind or subjective belief as to the veracity of the letters may have been, the evidence of record was that Plaintiff was discharged for engaging in protected conduct, and later refusing to confess and recant. Substantial and compelling evidence existed in the process that led to the writing of two anonymous letters that many of Defendant's employees, including Ms. Ortiz, had a well founded subjective belief that dissent or complaint within the workplace would be punished. Assuming, for the sake of argument, that Defendant had an actual belief that the letters were false, the Record before the Trial Court at the time it entered summary judgment showed that even if it were accepted that Defendant indeed had such an actual belief, this nevertheless did not remove from the realm of possible triable factual questions the following issues: 1) whether or not the supervisory personnel had engaged in prohibited sexual harassment; 2) whether or not Plaintiff has a good faith belief in the veracity of the allegations; 3) whether the audit conducted by management was a fair and impartial investigation of the misconduct set forth in the two anonymous letters, or whether said audit in actuality was conducted in order to identify, intimidate and to punish those individuals who had voiced opposition to management; 4)and ultimately, even if Defendant had a subjective belief in the falsity of the letters, whether Mrs. Ortiz's discharge was the result of retaliation for her having taken part in protected expression or conduct.

Clearly, the above issues, if resolved in Plaintiff's favor at trial could lead to the assessment of punitive damages against

Defendant.

Under the Trial Court's analysis, as set forth in its Second Memorandum Opinion and Order, the scope of protected conduct under Title VII is so narrow as to be rendered meaningless, since any articulation of a belief on the part of management that a particular accusation leveled by an employee against the company was untrue, baseless, or without merit, would by its very invocation serve to counter a Plaintiff's prima facie showing of retaliatory discharge, and thereby render a Plaintff's claim almost automatically subject to dismissal at the summary judgment stage.

The Trial Court found that Ortiz had presented no evidence indicating that Butler's discharge of her was for any reason other than for Butler's stated belief that she had intentionally filed baseless charges of sexual harassment against her supervisors, in order to get them fired.(Id.).

Yet the record reveals ample and sufficient evidence to the contrary: Plaintiff was given the opportunity to remain at Butler, so long as she admitted and recanted her alleged wrongdoing. Were the proferred reason indeed the actual reason for the discharge, then Ortiz would have been discharged on the spot, without being given an opportunity to "take responsibility."Viewed in light of the above facts, the Trial Court's specific finding that the record demonstrated that Defendant did not act with actual knowledge that it was violating any of the plaintiff's federally protected rights or with reckless disregard of these rights in terminating her employment

was in error, as was its conclusion that Ortiz was not entitled to punitive damages as a matter of law. (R-14, at 9).

In cases of intentional discrimination in employment, Section 42 USC 1981 (a) provides that the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of said section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. Sec. 2000e].

Yet in this case the Trial Court was able to reach a result which rendered Plaintiff's claims "moot", based on its assesment that as as a "matter of law" Plaintiff was not entitled to punitive damages, by applying the wrong law, which embodied a narrower legal standard than that which actualy controlled. The Court stated that in a Title VII retaliatory discharge case, punitive damages "are only appropriate in an egregious case of intentional discrimination when the defendant engaged in the unlawful employment practice with actual malice, or with reckless indifference as to indicate a wanton disregard for the rights of others," (R-14, at 9), citing Jackson v. Bunge Corporation 40 F. 3d 239, 246 (7th Cir.), and Hudson v. Soft Sheen Products, 873 F. Supp. 132, 136 (N.D. Ill. 1995).

The Trial Court's analysis was founded upon standards set forth in employment discrimination cases involving diversity of citizenship, wherein the substantive law of the State of Illinois was applied, instead of federal common law. Jackson v.

Bunge Corporation 40 F. 3d 239, 246 (7th Cir.),Hiatt v. Rockwell International 26 F. 3d 761 (7th Cir. 1994). Illinois law requires a significantly higher level ofculpability, than does federal common law.Under Illinois law, an employer must demonstrate utter indifference to, or conscious disregard for the employee's rights and the law in order to warrant an assessment of punitive damages. Id. Yet this higher threshold evidentiary burden was not applicable to the facts of this case, since issues of damages under Title VII and Section 1981 are to be a determined by an application of federal common law of damages,which imposes uniformity when enforcing the Civil Rights Acts. Lenard v. Argento, 699 F.2d 874, 897 (7th Cir.1983).

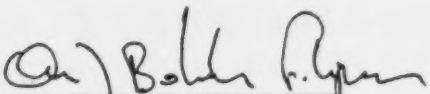
Under governing federal common law, it is well settled that a plaintiff who establishes a cause of action under Sec. 1981 may recover punitive damages under the proper circumstances. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975). The Supreme Court in Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983), set forth the standard for punitive damages in a Sec. 1983 claim: "[A] jury may be permitted to assess punitive damages ... when the defendant's conduct is shown to be motivated by evil motive or intent, or it involves reckless or callous indifference to the federally protected rights of others." This is equally applicable to a suit brought under Sec. 1981. Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508, (7th Circuit, 1986).

The Court of Appeals found that while the district court's articulation of the showing required for entitlement to punitive damages differed to some extent from the one contained in the statute, "the deviation is not significant." Slip Op. at 12.

Respectfully, this assessment was in error, because had the Trial Court applied the correct standard, the issue of punitive damages would have been for the jury to decide at the conclusion of trial, and not by the Trial Court on summary judgment.

The Trial Court's granting of the second summary judgment motion, when it is seen in the light of the same Trial Court's earlier denial of a very similar motion ,and in light of the fact that during the intervening period no new evidence had been adduced, was in error, since the same triable issues of fact were in existence during the pendency of both motions.. For this reason, as well as for the other reasons set forth above the Trial Court erred by granting Summary Judgment, and the Court of Appeals erred by affirming the Trial Court's decision.

Respectfully submitted,



Andrey Bohdan Filipowicz

TABLE OF CONTENTS TO APPENDIX

1. Slip Opinion, Court of Appeals for Seventh Circuit.

2. Text of Seventh Amendment to the Constitution of the United States.

3. Statute Involved.

No. 95-2828

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAELINA ORTIZ *Plaintiff-Appellant,*	)	
	)	Appeal from the United States District Court, Northern District of Illinois, Eastern Division. No. 93 C 1123 James F. Holderman, Judge.
v.	)	
JOHN O. BUTLER COMPANY *Defendant-Appellee.*	)	

ORDER

ARGUED APRIL 9, 1996--DECIDED SEPTEMBER 9, 1996

Before EASTERBROOK, RIPPLE, and KANNE, Circuit Judges.

KANNE, Circuit Judge. Micaelina Ortiz sued John O. Butler Company, alleging that Butler violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq., by terminating her employment in retalia-

tion for her making complaints regarding what she alleges were hostile and discriminatory working conditions. The district court granted summary judgment in favor of Butler on the ground that Ortiz's claim was moot because, even if she prevailed, she would not be entitled to any damages. Ortiz appeals, and we affirm.

I.

Butler is a manufacturer and distributor of oral hygiene products. Ortiz was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992.

In mid-March 1992, two anonymous letters were submitted to Butler's management complaining about the working conditions in the molding department. The letters made numerous accusations against the molding department supervisors, including allegations that the supervisors reprimanded the employees with obscenities, threatened employees with verbal and mental abuse, and sexually harassed employees. In response to the two letters, Butler management conducted an audit of the molding department personnel in order to investigate the complaints. The audit consisted of Susan Bondy, the director of human resources, and William Spangler, the director of operations, jointly conducting interviews of the molding department employees over a two-week period.

During the interviews, the audit team asked the employees questions about their work environment in general and whether they had any knowledge of any incidents of sexual harassment.

During the audit, the employees did not confirm the allegations of discrimination made in the two letters. While several employees complained about their supervisors' harsh language, each of the first-shift employees, including Ortiz, specifically denied that any of their supervisors ever had discriminated against them or made comments of a sexual nature to them or to others.

In addition, during their audit interviews several employees identified Ortiz as having written one of the two anonymous letters, having asked them to sign a letter, or having asked them to lie about incidents of sexual harassment during the audit interviews so that their supervisors would be fired. In order to investigate these accusations, Bondy and Spangler conducted a follow-up interview with Ortiz. In the second interview, Ortiz denied that she was involved in the drafting of either of the two letters complaining about the working conditions at Butler and denied that she solicited anyone to sign either letter.

After the audit was completed, Butler accused Ortiz and others of intentionally and maliciously creating and disseminating false claims of sexual harassment in order to discredit their supervisors and get them fired. Butler suspended all the employees, including Ortiz, believed to be

involved in the alleged creation of the falsehoods. At individual meetings these employees were advised of their one-day suspension and were asked to reflect upon their conduct and to decide whether they were committed to Butler or whether they wished to resign and receive severance pay.

After the suspension period, Bondy and Spangler again met privately with each of the three employees who had served their suspensions. The two other employees admitted their involvement in the letter-writing scheme, but Ortiz denied that she had done anything. Ortiz was then informed that because of her unwillingness to accept any responsibility for her conduct relating to the letters and her inability to get along with her coemployees, which had been a documented and continuing problem, her employment at Butler was terminated. Ortiz's termination was the subject of an NLRB claim, upon which Ortiz and Butler reached a settlement.

Ortiz subsequently sued Butler under Title VII, alleging that Butler unlawfully discharged her in retaliation for her exercise of her protected rights, admitting that she had, in fact, participated in writing the second letter. In her supplemental damage statement to the final pretrial order, Ortiz identified three categories of damages to which she was entitled: (1) lost wages and benefits in the amount of $15,350.40, less the settlement of the NLRB claim for the same lost wages and benefits in the amount

of $16,000, resulting in total lost wages and benefits of negative $649.60; (2) "increased burden of proof" damages in the amount of $100,000;/1 and (3) punitive damages in the amount of $300,000.

Butler moved for summary judgment on the ground that, even if she had made out a prima facie case for liability,/2 Ortiz's claim was moot because she could not recover any damages. The district court agreed, finding that Ortiz has not identified any damages she could recover if she were to prevail. The district court found that (1) Ortiz was not entitled to any compensatory damages because those claimed were offset by the NLRB settlement, (2) the "increased burden of proof" damages were not recoverable in a Title VII action, and (3) Ortiz had presented no evidence that would entitle her to punitive damages.

After the district court's grant of summary judgment, Ortiz filed a pro se notice of appeal. The notice names her as the appealing party, notes that Judge Holderman was the presiding judge, and sets forth the appropriate case number. The notice does not specifically state that Ortiz is appealing from the grant of summary judgment on mootness grounds, nor does it state the court to which Ortiz is appealing.

II

A.

In reviewing a district court's grant of summary judgment, we assess the record de novo and reach our own conclusions regarding law and fact. Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 181 (7th Cir. 1995). We will not resolve factual disputes or weigh conflicting evidence. We will only determine whether a genuine issue of material fact exists for trial, which is the case where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). In reaching a conclusion as to the presence of a genuine issue of material fact, we must view the evidence and draw all inferences in a way most favorable to the nonmoving party. Tolentino v. Friedman, 46 F.3d 645, 649 (7th Cir.), cert. denied, 115 S. Ct. 2613 (1995). Where there is no genuine issue of material fact, the sole question is whether the moving party is entitled to judgment as a matter of law. If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party. Richards v. Combined Ins. Co. of America, 55 F.3d 247, 251 (7th Cir. 1995).

B

Before addressing the merits of this appeal, we must consider the argument raised by Butler that we lack jurisdiction over this appeal because Ortiz's notice of appeal fails to comply with the requirements of FED. R. APP. P. 3(c).

Rule 3(c) provides:

A notice of appeal must specify the party or parties taking the appeal by naming each appellant . . . . A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. FED. R. APP. P. 3(c).

The Supreme Court has held that the requirements of Rule 3(c) are jurisdictional and "their satisfaction is a prerequisite to appellate review." Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 682 (1992); Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, 108 S. Ct. 2405, 2409 (1988). Nevertheless, "mere technicalities" should not stand in the way of our consideration of the merits, and we will find a notice of appeal sufficient so long as it "is the functional equivalent of what the rule requires." Torres, 487 U.S. at 316-17, 108 S. Ct. at 2408-09.

We first consider the impact of Ortiz's failure to specifically state in the notice of appeal that she is appealing from the grant of the motion for summary judgment on mootness grounds. "[A]n error designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal from the judgment complained of may be inferred from the notice and if the appellee has not been misled by the defect." Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 625 (7th Cir. 1993) (quoting Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542, 1546 (7th Cir. 1985)). Although the notice does not specifically designate that Ortiz was appealing from the summary judgment on mootness grounds, such an inference is readily drawn from the text of the notice, which includes the statement that Ortiz "COMPLAINS THAT SHE HAS [A] PROBABILITY OF A TANGIBLE BENEFIT FROM WINNING THE SUIT." Because we cannot see how Butler was misled by the defect, we find that the notice of appeal was sufficient with respect to this element.

We next consider the fact that the notice of appeal failed to designate the court to which Ortiz was appealing. Although designation of the court to which the appeal is taken is a mandatory requirement under Rule 3(c), the defect is not fatal where the intention to appeal to a certain court may be inferred from the notice and the defect has not misled the appellee. See United States v.

Musa, 946 F.2d 1297, 1301 (7th Cir. 1991); see also Anderson v. District of Columbia, 72 F.3d 166, 168 (D.C. Cir. 1995); McLemore v. Landry, 898 F.2d 996, 999 (5th Cir.), cert. denied, 498 U.S. 966 (1990). It is sufficient for our purposes that Ortiz's intent to appeal to this court is evidenced by the fact that, except in circumstances not applicable to this case, this is the only court to which Ortiz could have appealed. Musa, 946 F.2d at 1301; see also Anderson, 72 F.3d at 168; McLemore, 898 F.2d at 999. Again, Butler has not shown that it was misled by the failure to make an explicit designation. Therefore, we may exercise jurisdiction over this appeal.

III

A federal court's subject matter jurisdiction extends only to actual cases and controversies. Powell v. McCormack, 395 U.S. 486, 496 n.7, 89 S. Ct. 1944, 1950 n.7 (1969). A plaintiff seeking redress in a federal court must show "(1) an actual or threatened injury; (2) an injury that is 'fairly traceable' to the conduct; and (3) an injury that is likely to be redressed by a favorable decision." Jorman v. Veterans Admin., 830 F.2d 1420, 1424 (7th Cir. 1987). An injury is no longer redressable where "the parties lack a legally cognizable interest in the outcome." Powell, 395 U.S. at 496, 89 S. Ct. at 1951. Thus, where a plaintiff has received all of the requested relief to which she is legally entitled, there is no longer the requisite case or

controversy, and the court is without jurisdiction. See Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994); Harrison v. United Mine Workers of America, 941 F.2d 1190, 1193 (11th Cir. 1991).

The district court granted summary judgment in favor of Butler because it concluded that Ortiz had already received the compensatory damages she had requested and that the "increased burden of proof" damages and punitive damages were not available to her as a matter of law. Ortiz has affirmatively abandoned her contention that she was entitled to the "increased burden of proof" damages. Thus, the only remaining questions are whether she was potentially entitled to any additional compensatory damages or to any punitive damages.

Ortiz raises several arguments for the proposition that she was entitled to compensatory damages over and above the lost wages and benefits that were offset by the NLRB settlement. However, Butler argues, and our review of the record confirms, that Ortiz raised these arguments for the first time on appeal. Ortiz has waived these arguments by failing to raise them before the district court, and we will not consider their relative merit. Pozzie v. U.S. Dept. of Housing & Urban Dev., 48 F.3d 1026, 1030 n.1 (7th Cir. 1995).

Ortiz raises two arguments challenging the district court's conclusion that she was not entitled to punitive damages. First, she argues that the district court applied an incorrect standard for determining when employers may be liable for punitive damages under Title VII. Second, she argues that there was a genuine issue of material fact as to whether she was entitled to punitive damages.

Citing to Hudson v. Soft Sheen Products, Inc., 873 F. Supp. 132, 136 (N.D. Ill. 1995), which discussed the legislative history of the Civil Rights Act of 1991, and Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994), the district court stated its conception of what a plaintiff must show to be entitled to punitive damages:

> Although punitive damages may properly be awarded in Title VII retaliatory discharge cases, they are only appropriate in an egregious case of intentional discrimination when the defendant engaged in the unlawful employment practice with actual malice, or with reckless indifference as to indicate a wanton disregard for the rights of others.

Ortiz argues that the district court erred by actually articulating the Illinois standard for punitive damages, which is what we applied in Jackson, a diversity case. As we recently noted, whether punitive damages are available in a Title VII case is a question of federal law and does

not concern the availability of punitive damages at state law. Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1352 (7th Cir. 1995).

The statute itself prescribes the proper standard for awarding punitive damages:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.42 U.S.C. sec. 1981a(b)(1).

Although the district court's articulation of the showing required for entitlement to punitive damages differs to some extent from the one contained in the statute (42 U.S.C. sec. 1981a(a)(2) sets forth the requirement that the discrimination be intentional), the deviation is not significant. In any event, Ortiz remains unable to show that there is a genuine issue of material fact that she would be entitled to punitive damages.

The district court concluded that Ortiz had failed to present any evidence that Butler terminated her employment with malice or reckless indifference to her protected rights, and we agree. Among the uncontested facts is the following statement concerning Butler's reason for ter-

BEST AVAILA

minating her: "Plaintiff was first suspended and later discharged because Defendant believed that Plaintiff had intentionally and maliciously filed baseless charges against her supervisors and Plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment."

Ortiz argues that even though Butler fired her because it believed she had intentionally asserted baseless charges that does not mean the charges were, in fact, baseless and Butler's belief that the charges were baseless should not be sufficient to rebut a prima facie case of retaliatory discharge. Ortiz's arguments relate to Butler's liability in the first instance, which is distinct from Butler's liability for punitive damages. The requisite showing for punitive damages necessarily focuses upon the defendant's state of mind to discern the presence of malice or reckless indifference to the plaintiff's protected rights. And the evidence as to Butler's intent can only support the inference that Butler fired her because it sincerely believed she had intentionally asserted baseless charges.

Ortiz has also presented no evidence that impugns the fairness of the audit that Butler conducted to investigate the charges in the letters. Ortiz argues in her brief, without any citation to the record, that there is evidence that the audit was not conducted anonymously and that several employees were intimidated by the audit process. Ortiz also offers considerable speculation concerning a number of "possible triable factual questions." Speculation is in-

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sufficient to withstand summary judgment; the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). And even if we could locate Ortiz's evidence, it is insufficient to raise a genuine issue of material fact that Butler terminated her with malice or reckless indifference to her federally protected rights.

For the foregoing reasons, the judgment is AFFIRMED.

FOOTNOTES

/1 Ortiz slipped and fell on Butler's premises eight months after she was terminated. Ortiz reasoned that had she remained employed at Butler she would have been able to file a worker's compensation claim, which has a lesser burden of proof than the common law negligence action that she actually filed. She valued the harm occasioned by this "increased burden of proof" at $100,000.

/2 The district court denied a previous Butler motion for summary judgment in which Butler had argued that Ortiz had failed to make out a prima facie case. In its memorandum opinion and order denying that motion, the district court held that Ortiz had, in fact, made out a prima facie case of retaliatory discharge and that "a reasonable fact finder could conclude that plaintiff reasonably believed that she challenged conduct which violated Title VII and that she was terminated for her opposition."

Statute Involved

Title VII of the Civil Rights Act of 1964

42 U.S.C. sec. 2000 e et seq.

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-950

In The

Supreme Court of the United States

October Term, 1996

MICAELINA ORTIZ,

Petitioner,

vs.

JOHN O. BUTLER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly affirm the District Court's dismissal of petitioner's retaliatory discharge claim because the claim was moot, petitioner having already received all of the requested relief to which she was legally entitled?

2. Separate and apart from the mootness of petitioner's claim, might that claim have been dismissed on the alternative ground that no genuine issue of material fact existed with respect to respondent's legitimate, non-retaliatory reason for terminating petitioner's employment?

LIST OF INTERESTED PARTIES

The petitioner is Micaelina Ortiz. The caption incorrectly spells petitioner's name as "Michaelina Ortiz."

The respondent is correctly identified in the caption as John O. Butler Company. The parent corporation of respondent is Sunstar, Inc. The respondent has no interest in any non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Denying the Writ	4
I. The District Court properly dismissed Ortiz's retaliatory discharge claim because it was moot, Ortiz having received all of the requested relief to which she was legally entitled, the Court of Appeals correctly affirmed that determination, and there is no reason for this Court's review of that decision.	4
II. The District Court's judgment might also have been affirmed on the alternative ground that because Ortiz was not a victim of intentional discrimination, summary judgment should have been entered against her on her claim of retaliatory discharge.	8

Contents

Page

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Cox v. Phelps Dodge Corp., 43 F.3d 1345 (10th Cir. 1994) 6

Cushing v. City of Chicago, 3 F.3d 1156 (7th Cir. 1993) 8

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986) 9

Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994) .. 9, 10

Hamann v. Gates Chevrolet, Inc., 910 F.2d 1417 (7th Cir. 1990) 9, 10

Harrison v. United Mine Workers of America, 941 F.2d 1190 (11th Cir. 1991) 6

Klein v. Trustees of Indiana University, 766 F.2d 275 (7th Cir. 1985) 10

Morgan v. Harris Trust & Savings Bank of Chicago, 867 F.2d 1023 (7th Cir. 1989) 10

Palda v. General Dynamics Corp., 47 F.3d 872 (7th Cir. 1995) 8

Contents

	Page
Powell v. McCormack, 395 U.S. 486 (1969)	5
Powers v. Dole, 782 F.2d 689 (7th Cir. 1986)	10
Rucker v. Higher Educational Aids Board, 669 F.2d 1179 (7th Cir. 1982)	9
Statutes Cited:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 621 *et seq.*	3
42 U.S.C. § 1981a	2
42 U.S.C. § 1981a(b)(1)	6
42 U.S.C. § 2000e *et seq.*	3
42 U.S.C. § 2000e-3	1
Rule Cited:	
Supreme Court Rule 10	7

APPENDIX

Appendix — Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division Decided May 26, 1994 ..... 1a

Respondent requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on September 9, 1996.

OPINIONS BELOW

The unanimous opinion of the Court of Appeals is reported at 94 F.3d 1121. The memorandum opinion and order of the District Court that was affirmed on appeal is reported at 1995 U.S. Dist. LEXIS 9582 (the "July 6 Opinion"). The District Court's earlier memorandum opinion and order is reported at 1994 U.S. Dist. LEXIS 7149 and is reproduced in the Appendix hereto (the "May 26 Opinion").

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1996. While petitioner has invoked the jurisdiction of this Court "pursuant to Title VII of the Civil Rights [*sic*] of 1991, 42 U.S.C. Section 2000(e), *et seq.*, and 28 U.S.C. 1291," (petition at 2), this Court's jurisdiction properly is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> **§ 2000e-3. Other unlawful employment practices.**
>
> (a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

United States Code, Title 42:

> **§ 1981a. Damages in cases of intentional discrimination in employment.**
>
> (b) **Compensatory and punitive damages**
>
> (1) **Determination of punitive damages**
>
> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

STATEMENT OF THE CASE

This action was commenced in 1993 by petitioner, Micaelina Ortiz ("Ortiz"), by her filing of a two-count complaint against respondent, John O. Butler Company ("Butler"). In Count I of her complaint, Ortiz alleged that Butler violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"), by terminating her employment because she made complaints about the hostile and discriminatory working conditions which she alleged existed at Butler. In Count II, Ortiz alleged, alternatively, that Butler discharged her due to her age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA").

Butler moved for summary judgment on both counts of the complaint and, on May 26, 1994, the District Court granted Butler's motion as to Count II (the ADEA claim), but denied the motion as to Count I (the Title VII retaliatory discharge claim). (Resp. App. at 13a-14a.) Butler thereafter filed a motion to reconsider the denial of summary judgment as to Count I, which motion was denied. With leave of court, Butler thereafter filed an amended motion for reconsideration which was also denied.

After the final pretrial order was entered by the court, Butler filed its motion for summary judgment based on the mootness of Ortiz's claim. On July 6, 1995, the District Court issued its memorandum opinion and order granting this motion. 1995 U.S. Dist. LEXIS 9582. The memorandum opinion and order were entered on the docket on July 10, 1995, and final judgment was entered on July 21, 1995. This judgment was affirmed by the Court of Appeals for the Seventh Circuit in its decision rendered September 9, 1996. 94 F.3d 1121.

Regarding the facts of this case and additional proceedings in the courts below, Butler incorporates by reference herein the statement of the facts found in the decision of the Court of Appeals, 94 F.3d at 1123-1124.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT PROPERLY DISMISSED ORTIZ'S RETALIATORY DISCHARGE CLAIM BECAUSE IT WAS MOOT, ORTIZ HAVING RECEIVED ALL OF THE REQUESTED RELIEF TO WHICH SHE WAS LEGALLY ENTITLED, THE COURT OF APPEALS CORRECTLY AFFIRMED THAT DETERMINATION, AND THERE IS NO REASON FOR THIS COURT'S REVIEW OF THAT DECISION.

The petition presents no reason, compelling or otherwise, for the review on a writ of certiorari of the decision of the Seventh Circuit. The District Court properly granted summary judgment in Butler's favor because the claim asserted in Count I of Ortiz's complaint had become moot, Ortiz having received all relief to which she was entitled. Pursuant to the settlement of her NLRB charge, Ortiz had received an amount in excess of the lost wages and benefits sought to be recovered, and she failed to identify any other recoverable damages in her damage statement which she submitted and which was incorporated in the final pretrial order, or to indicate that she was seeking any other cognizable relief. She had no possibility of receiving a tangible benefit from proceeding to trial and, therefore, Count I was properly dismissed. As recognized by the Court of Appeals, Ortiz waived the argument that she should have been allowed to proceed to trial because she may have been able to recover compensatory damages other than those set forth in her damage statement,

because she failed to raise this argument in the District Court. Moreover, any unresolved issue regarding an award of statutory attorneys' fees, standing alone, could not create the case or controversy required for the proper exercise of the District Court's jurisdiction. Finally, the stipulated facts of record established as a matter of law that Ortiz was not entitled to an award of punitive damages.

Ortiz's supplemental damage statement to the final pretrial order identified, and quantified, three categories of damages: (1) lost wages and benefits, which were offset by the NLRB settlement; (2) "increased burden of proof" damages in the amount of $100,000; and (3) punitive damages of $300,000. 94 F.3d at 1123-24.

The District Court's grant of summary judgment in favor of Butler was grounded on its finding "that Ortiz's claim was moot because, even if she prevailed, she would not be entitled to any damages," and the Seventh Circuit applied the proper standard of review in affirming this judgment:

> If the non-moving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party.

94 F.3d at 1124.

Since a federal court's subject matter jurisdiction extends only to actual cases and controversies, *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969), the district court is without jurisdiction "where a plaintiff has received all of the requested relief to which she is legally entitled, [because] there is no longer the requisite case or controversy. . . ." 94 F.3d at 1125, citing

Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994), and *Harrison v. United Mine Workers of America*, 941 F.2d 1190, 1193 (11th Cir. 1991). Because Ortiz abandoned in the Court of Appeals her contention that she was entitled to damages relating to her "increased burden of proof" theory, the only remaining questions before the Court of Appeals were "whether she was potentially entitled to any additional compensatory damages or to any punitive damages." 94 F.3d at 1126.

The Court of Appeals correctly concluded that Ortiz's arguments relating to compensatory damages were waived because she failed to raise them in the District Court, advancing them for the first time on appeal, *id.*, and that, as a matter of law, Ortiz was "unable to show that there is a genuine issue of material fact that she would be entitled to punitive damages." *Id.* To recover punitive damages, Ortiz was required to demonstrate that Butler engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of [Ortiz]." 42 U.S.C. §1981a(b)(1); 94 F.3d at 1126. The Seventh Circuit concurred with the conclusion of the District Court that Ortiz "failed to present any evidence that Butler terminated her employment with malice or reckless indifference to her protected rights. . . ." *Id.* Indeed, among the uncontested facts in the District Court record was this one regarding Butler's reason for terminating Ortiz:

> Plaintiff was first suspended and later discharged because Defendant believed that Plaintiff had intentionally and maliciously filed baseless charges against her supervisors and Plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment.

Id., quoting from the District Court record.

Ortiz failed to adduce any evidence or present any genuine issue of material fact regarding any possible entitlement to punitive damages; the undisputed evidence as to Butler's intent, including the foregoing uncontested fact, "can only support the inference that Butler fired her because it sincerely believed she had intentionally asserted baseless charges," 94 F.3d at 1127, and therefore did not act with the requisite malice or reckless indifference. Ortiz presented no evidence impugning the fairness of the investigation and interviewing process conducted by Butler's management in response to the charges in the two anonymous letters. *Id.*

The writ should be denied for any and all of the following reasons: (1) this case presents no conflict of decisions among the federal circuits or with any decision of this Court; (2) the decision of the Court of Appeals was properly decided; (3) the decision of the Court of Appeals turns on its own facts — that is, Ortiz was terminated based upon the undisputed fact that she was first suspended and later discharged because Butler believed she "had intentionally and maliciously filed baseless charges against her supervisors" and acted on this belief in discharging Ortiz; and (4) the presence of other meritorious arguments, as discussed in Part II below, which demonstrate that the decision of the Seventh Circuit is correct without regard for the Questions Presented for Review in Ortiz's petition, which makes it unnecessary to reach those questions raised by the petition. There is no consideration, as identified by Rule 10 of the Rules of this Court, which supports the granting of the petition. The Court of Appeals fully considered and correctly decided the case, and the issues presented by the petition do not warrant review by this Court.

II.

THE DISTRICT COURT'S JUDGMENT MIGHT ALSO HAVE BEEN AFFIRMED ON THE ALTERNATIVE GROUND THAT BECAUSE ORTIZ WAS NOT A VICTIM OF INTENTIONAL DISCRIMINATION, SUMMARY JUDGMENT SHOULD HAVE BEEN ENTERED AGAINST HER ON HER CLAIM OF RETALIATORY DISCHARGE.

At a pretrial conference held on March 7, 1995, the date on which the final pretrial order was entered, the District Court granted Butler leave to file a motion for reconsideration of its original motion for summary judgment in light of certain new authority not previously cited by the parties. While this second amended motion for reconsideration was pending, Butler filed the motion for summary judgment based on the mootness of Ortiz's claim, which the District Court granted on July 6, 1995, and which the Seventh Circuit affirmed. The dismissal of Count I of the complaint may have been affirmed on the alternative ground that there was no genuine issue of material fact with respect to Butler's legitimate, non-retaliatory reason for terminating Ortiz's employment. Therefore, the decision of the Court of Appeals is correct without regard for the questions sought to be raised by the petition.

A district court's decision to dismiss an action may properly be affirmed on any adequate ground appearing in the record, even if the district court did not rely on such ground. *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 n. 2 (7th Cir. 1995); *Cushing v. City of Chicago*, 3 F.3d 1156, 1167 (7th Cir. 1993). Butler's second amended motion for reconsideration (R.57) was pending at the time the District Court issued its July 6 Opinion, and summary judgment also could have been entered for the reasons stated in Butler's second amended motion for reconsideration.

To determine whether an employer has intentionally discriminated in violation of ADEA or Title VII, the employer's motive or intent must be determined — that is, it must be determined "whether the plaintiff is a victim of intentional discrimination." *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994); *see also Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990). Since in granting summary judgment in favor of Butler on Count II (the ADEA claim) the District Court found that the motive of Butler's decision-makers was legitimate and not a pretext for discrimination, that finding also would support the entry of judgment in favor of Butler on Ortiz's retaliatory discharge claim, asserted in Count I.

The District Court correctly concluded that Butler's decision-makers believed that Ortiz had engaged in conduct which is not protected opposition activity under Title VII, and acted on that belief:

> The evidence in this case clearly shows that plaintiff was first suspended and later discharged because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors and plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment.

(May 26 Opinion, Resp. App. at 13a.) The District Court recognized that "the filing of utterly baseless charges" of discrimination is not protected opposition activity (*id.*, Resp. App. at 6a), citing *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1182 (7th Cir. 1982), and concluded that Butler actually believed that Ortiz in fact had engaged in such unprotected activity and acted upon this belief in first suspending and later terminating her.

This unchallenged finding (to which Ortiz stipulated in the final pretrial order) would preclude any determination that Ortiz's termination was motivated by a discriminatory intent or that Ortiz was "a victim of intentional discrimination." *Gehring, supra*, 43 F.3d at 343. On the contrary, this finding should compel the conclusion that Butler fired Ortiz because it believed she had engaged in conduct in which she had no right to engage and which was destructive to the company's welfare. The underlying beliefs and reasons supporting the decision to terminate Ortiz are the same for Count I as for Count II; whether the claim asserted is one for violation of ADEA or retaliatory discharge, Butler's reasons for terminating Ortiz are identical.

Where, as in this case, the reasons for Butler's decision to terminate Ortiz were determined as a matter of law — based upon facts to which Ortiz stipulated — Butler was entitled to judgment on Ortiz's retaliatory discharge claim for the additional reason that the record clearly established that her termination was not the product of an impermissible retaliatory intent. Where there is no triable issue of fact, motive and intent may be determined as a matter of summary judgment. *Hamann v. Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990); *Morgan v. Harris Trust & Savings Bank of Chicago*, 867 F.2d 1023, 1026 (7th Cir. 1989); *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986). Because Ortiz failed to make any showing that her employment was terminated because of an impermissible discriminatory intent, summary judgment properly may have been entered by the District Court against Ortiz on Count I of her complaint on this ground as well. Because Ortiz "failed to produce any evidence raising a material issue of fact as to whether the defendants' *[sic]* proffered reason for its employment decision was pretextual," *Klein v. Trustees of Indiana University*, 766 F.2d 275, 283 (7th Cir. 1985), Butler was entitled to summary judgment on Count I of the complaint, apart from the mootness of that claim.

CONCLUSION

For the reasons stated, Ortiz's petition for a writ of certiorari to review the judgment and opinion of the Seventh Circuit should be denied.

Respectfully submitted,

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APPENDIX — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DECIDED MAY 26, 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 93 C 1123

1994 U.S. Dist. LEXIS 7149

May 26, 1994, Decided
May 27, 1994, Docketed

MICAELINA ORTIZ,

Plaintiff,

v.

JOHN O. BUTLER COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Micaelina Ortiz filed a complaint against defendant John O. Butler Company ("Butler") alleging retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. § 2000(e) et seq. (Count I), and termination in violation of the

Appendix

Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. (Count II). Defendant Butler has filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.[1] For the reasons stated below, defendant's motion for summary judgment is denied as to Count I and granted as to Count II.

BACKGROUND

Defendant Butler is a manufacturer and distributor of oral hygiene products. Plaintiff was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992. Plaintiff claims that she was terminated in retaliation for complaints she made about the working conditions at Butler and because of her age. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on November 30, 1992.[2]

Plaintiff alleges that during her tenure at Butler she was exposed to a hostile work environment. Plaintiff alleges that she was sexually harassed by her immediate supervisor, Frank Williams. Plaintiff claims that her supervisor continuously made lewd remarks to her such as "Hello beautiful legs, when are we going out" or "when are you going to let me come to your apartment." In addition, plaintiff alleges that her group leader,

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1. Defendant has also filed a motion to strike portions of the affidavits of both plaintiff and Marie Robles, a former employee of Butler, arguing that certain statements are hearsay or based on speculation. The court finds that defendant's motion to strike is moot because plaintiff has filed amended affidavits curing the problems that defendant raised in its motion.

2. See Complaint, Exhibit A.

Earl Phillips, would intimidate workers through the use of foul, intimidating language, derogatory ethnic remarks, name calling and threats.

Plaintiff alleges that she, along with other Butler employees, asked both Williams and the President of Butler to meet with them to discuss and remedy their allegedly hostile and unsatisfactory working conditions, but their requests were denied. After these requests were denied, plaintiff alleges that two anonymous letters were submitted to management complaining about the working conditions at Butler. The second letter accused Earl Phillips of "always getting fresh with the girls verbally and manually," and accused the Molding Department's Supervisor, Frank Williams of knowing about Phillips's behavior but doing nothing and himself of being "fresh with us verbally."[3]

In response to these letters, Butler management decided that the company should conduct an audit of the Molding Department personnel to investigate the complaints made in the two letters. The audit consisted of Susan Bondy, Director of Human Resources, conducting individual employee interviews during which the interviewer would ask questions about the employee's work environment.

At plaintiff's first interview, plaintiff stated that she had not heard anyone in management use foul language or make sexual comments. At a later interview, plaintiff denied that she was involved in the drafting of either of the two letters complaining about the working condition at Butler. In addition,

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3. See Statement of Unidisputed Material Facts, Exhibit B.

at plaintiff's deposition she again denied being involved in the drafting of either letter. Plaintiff, however, now admits in an affidavit filed with the court in response to defendant's motion for summary judgment to having participating [sic] in the drafting of the second letter. Plaintiff states that she lied at her interview and deposition about her involvement in the drafting of the second letter because she was physically afraid of Mr. Phillips and was worried about being fired if she confessed her role.[4]

After the audit was completed, Butler accused plaintiff of intentionally and maliciously creating and disseminating false claims of sexual harassment. Defendant suspended all the employees believed to be involved in the alleged creation of the falsehoods except for plaintiff, who was terminated on April 6, 1992. Plaintiff, who was forty-four at the time of her termination, claims the reason she was terminated, while other younger employees accused of the same conduct were merely suspended and demoted, was because of her age.

ANALYSIS

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is inappropriate when there is a dispute over facts which might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In ruling on a motion for summary judgment the evidence of the non-movant must be

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4. See Ortiz Affidavit, PP 12, 20-26.

believed, and all justifiable inferences must be drawn in the non-movant's favor. Id. at 2513. This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

However, when a party bears the burden of proof on an issue, that party may not simply rest on its pleadings to defeat summary judgment, but must affirmatively demonstrate with specific factual allegations that a genuine issue of material fact exists and requires a trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The party must do more than simply "show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986) (footnote omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " Id.

I. Retaliatory Discharge Claim

Plaintiff claims that she was terminated in retaliation for complaints she made about the allegedly hostile and unsatisfactory working conditions at Butler in violation of Title VII. Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 2000e-3(a). The Seventh Circuit applies the burden-

shifting sexual discrimination analysis to retaliatory discharge claims. See Samuelson v. Durkee/French/Airwick, 976 F.2d 1111, 1114 (7th Cir. 1992). Under the burden-shifting formula, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. Id. at 1113. Once the plaintiff meets that burden, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. If the employer is able to articulate a non-discriminatory reason for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons are merely a pretext for retaliatory discharge. Id. at 1114.

To establish a prima facie case of retaliatory discharge in violation of Title VII, plaintiff must show that: (1) she engaged in statutorily protected opposition; (2) she suffered adverse action by Butler; and (3) there is a causal link between her opposition and the adverse employment action. See Samuelson, 976 F.2d at 1114-15 (citing Collins v. Illinois, 830 F.2d 692, 702 (7th Cir. 1987)). In order for the plaintiff's expression to be statutorily protected, the practice that plaintiff is challenging need not actually violate Title VII. "Instead, it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct in violation of Title VII." Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314 (7th Cir. 1989) (citations omitted).

The Seventh Circuit has held that it is a violation of 42 U.S.C. § 2000e-3(a) to fire an employee because she opposed discrimination even if she was mistaken and there was in fact no discriminatory conduct. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982).

> The mistake must, of course, be a sincere one; and presumably it must be reasonable . . . for

> it seems unlikely that the framers of Title VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not he fact of discrimination, that is the critical inquiry in a retaliation case.

Id.

In this case, the evidence shows that plaintiff was first suspended and then later terminated, at least in part, because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors.[5] Defendant argues, however, in support of its motion for summary judgment that because plaintiff insisted both during the audit and in her deposition that she did not write or disseminate the letters at issue in this case, plaintiff fails to establish the first element of a prima facie case of retaliation — that she engaged in opposition to practices that she reasonably believed violated Title VII.

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5. See Statement of Undisputed Material Facts, PP 72 - 90 and Exhibit E. Defendant states that because so many other employees identified plaintiff as someone who either had asked them to sign one of the letters describing the allegedly hostile work environment at Butler or who had written one of the letters, Butler management concluded that plaintiff clearly was involved in disseminating what they believed to be false claims regarding Williams and Phillips. Plaintiff was then notified that she was suspended for one day and demoted to a job in the production department with less pay "for making false statements and accusations with malicious intent." In addition, defendant states that plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harassment and to accept responsibility for her behavior.

Appendix

In Darnell v. Target Stores, 16 F.3d 173, 176 (7th Cir. 1994), the Seventh Circuit held that when a district court is faced with contradicting deposition testimony and affidavit statements from the same person, the conclusory statements in an affidavit cannot create a conflict with plain admissions in deposition testimony. The court went on to state that it is proper for a district court to rely on the deposition testimony and to disregard subsequent, contradictory affidavit statements of a witness on summary judgment because, "inherently depositions carry an increased level of reliability." Id.

In this case, however, even if the court accepts as true plaintiff's deposition testimony that she did not write or disseminate the letters complaining about sexual harassment at Butler, plaintiff is still able to prove a prima facie case of retaliatory discharge because the defendant admits that it believed that plaintiff had complained of sexual harassment and acted on this belief when suspending and terminating plaintiff.

In E.E.O.C. v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993), the Sixth Circuit held that § 2000e-3(a) prohibits an employer from discriminating against third-parties, who have not actually engaged in protected activity themselves, in retaliation for a co-employee's protected opposition. The court stated that although the language of § 2000e-3(a) indicates that Congress did not consider the possibility of allowing a retaliation claim by a party who had not engaged in protected opposition, "the very clear intent of Congress would be undermined" if third-party reprisals were tolerated. Id.

The court found that in enacting § 2000e-3(a), "Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." Id. Because "tolerance of third-party

reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII," the court concluded that the provisions of § 2000e3(a) prohibit third-party reprisals. Id. at 544. The court stated that even though the statute does no [sic] specifically provide for a claim by a third-party who has not opposed discrimination, the majority of courts, including the Supreme Court, have been willing to construe the sections of Title VII broadly in order not to frustrate the statute's purpose which is to "prevent fear of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions.' " Id. (quoting Mitchell v. Robert DeMario Jewelry, Inc. 361 U.S. 288, 292, 80 S. Ct. 332, 335, 4 L. Ed. 2d 323 (1960)).

In fact, many courts have adopted interpretations of retaliation provisions in employment statutes, including Title VII, outside the literal terms of the statute in order to effectuate Congress's purpose of forbidding retaliatory activity. Ohio Edison, 7 F. 3d at 545. See e.g., Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (action taken against an individual in anticipation of that person engaging in protected opposition to discrimination constitutes retaliatory discharge in violation of 42 U.S.C. § 2000e-3(a)). Passer v. American Chemical Soc'y, 290 U.S. App. D.C. 156, 935 F.2d 322, 330 (D.C. Cir. 1991) (former employee could maintain an action under the ADEA's anti-retaliation provision); NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586, 590 (6th Cir.), cert. denied, 439 U.S. 819, 58 L. Ed. 2d 109, 99 S. Ct. 81 (1978) (anti-retaliation provision of the National Labor Relations Act prohibited an employer from firing an employee who refused to testify at a Board hearing despite the fact that the statute, by its terms, applied only to employees who had "filed charges or given testimony," and did not addresses a refusal to give testimony).

The court finds that under this line of thought the phrase in

§ 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to sexual harassment. This action is no less retaliatory under the statute than an action taken because an employee actually engaged in protected opposition. In light of the purpose of § 2000e-3(a) — to encourage persons to freely exercise their protected rights under Title VII by preventing the fear of retaliation — the court finds that this form of retaliation falls within the scope of 42 U.S.C. § 2000e-3(a).

If plaintiff intentionally and maliciously filed baseless charges against her supervisors as defendant argues, Title VII would not have prevented defendant from terminating plaintiff. Plaintiff has, however, presented evidence to this court indicating that her supervisors may have engaged in sexually harassing behavior.[6]

Because a genuine issue of fact exists as to whether plaintiff intentionally and maliciously filed baseless charges of sexual harassment against her supervisors as defendant argues, this court cannot rule as a matter of law that plaintiff has failed to prove a prima facie case of retaliatory discharge. When plaintiff's evidence is viewed in a light most favorable to her, as this court must do on summary judgment, a reasonable fact finder could conclude that plaintiff reasonably believed that she challenged conduct which violated Title VII and that she was terminated for her opposition. See Holland, 883 F.2d at 1314-15. Therefore, defendant's motion for summary judgment is denied as to Count I.

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6. See Ortiz Affidavit, PP 5-16 and Robles Affidavit, P 5.

II. ADEA Claim

Plaintiff also alleges that she was fired because of her age. For plaintiff to successfully prove an ADEA violation, she must first establish that "but for" the defendant's motive to discriminate against her because of her age, she would not have been discharged. Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992). Plaintiff may prove age discrimination by either of two methods. She may present direct evidence that her age was the determining factor in her discharge, or she may employ the burden-shifting method of proof set forth by the United States Supreme Court for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), later extended by the Seventh Circuit to ADEA cases. See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992) (quoting Oxman v. WLS-TV, 846 F.2d 448, 452 (7th Cir. 1988)).

Under the burden-shifting method of proof (the method used by plaintiff in this case), plaintiff may establish a prima facie case of discrimination by showing that she was:

> (1) within a protected class (age 40 or older); (2) performing her job according to her employer's legitimate expectations; (3) the subject of a materially adverse employment action; and (4) treated less favorably than younger employees.[7]

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7. The Seventh Circuit in Kralman v. Illinois Dept. of Veterans' Affairs No. 93-3398, slip op. at 10 (7th Cir. April 20, 1994), rejected a bright-line test that in order to establish a prima facie case of age discrimination the plaintiff was required to show that plaintiff was replaced by a person outside

(Cont'd)

Robinson v. PPG Indus., Inc., No. 92-3000, slip op. at 6 (7th Cir. May 4, 1994) (citations omitted).

"If the plaintiff succeeds in establishing a prima facie case, this creates a rebuttable presumption of discrimination, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge." Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). Once the employer has articulated nondiscriminatory reasons for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons are merely a pretext for age discrimination. Id. (citing Weihaupt v. American Medical Ass'n, 874 F.2d 419, 426-27 (7th Cir. 1989)).

To establish that defendant's justification is a pretext, plaintiff must show: 1) that a discriminatory reason more likely motivated the employer; or 2) that the employer's reasons are unworthy of credence. See Anderson v. Stauffer Chem. Co., 965 F.2d 397, 402 (7th Cir. 1992). Plaintiff may demonstrate that defendant's reasons are unworthy of credence in any of three ways: (1) by showing that the reasons have no basis in fact; (2) by showing that the reasons did not actually motivate plaintiff's discharge; or (3) by showing that the reasons were insufficient grounds for plaintiff's discharge. Weihaupt, 874 F.2d at 428.

In this case, plaintiff has chosen to prove her ADEA claim

(Cont'd)
of the protected class. The court recognized, however, "that there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination." Id.

under the burden-shifting method. Because this court finds defendant's reasons for plaintiff's discharge not to be a pretext for age discrimination, plaintiff's establishment of a prima facie case as to her discharge is inconsequential. The evidence in this case clearly shows that plaintiff was first suspended and later discharged because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors and plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment. Plaintiff does not dispute this evidence, but in fact relies on it as a basis for her retaliatory discharge claim.

Plaintiff has offered no evidence indicating that plaintiff's age was a factor in her termination. The evidence clearly shows that two other younger employees (one in her early forties and the other in his late twenties) accused of the same conduct were merely suspended and demoted instead of being terminated because, unlike plaintiff, they acknowledged their involvement in writing the letters accusing their supervisors of sexual harassment and affirmed their loyalty to the company.[8] The court therefore finds that the defendant is entitled to summary judgment in its favor on Count II of plaintiff's complaint because plaintiff has not presented sufficient evidence to this court which suggests that age was a factor in her discharge or which shows that defendant's reasons for plaintiff's discharge were a pretext for age discrimination.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is DENIED as to Count I and GRANTED

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8. See Statement of Undisputed Material Facts, PP 82 - 85.

as to Count II. Defendant's motion to strike is MOOT. The parties are strongly urged to discuss the settlement of this case and report on the status thereof on June 27, 1994 at 10 a.m.

ENTER:

JAMES F. HOLDERMAN

United States District Judge

DATED: May 26, 1994

96-950 (3)

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No.

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1996

MICHAELINA ORTIZ,
Petitioner,

vs.

JOHN O. BUTLER COMPANY,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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312/578-1211

Attorney for Petitioner
Michaelina Ortiz

50 pp

TABLE OF CONTENTS

I. OPINION AND ORDER, 5/27/94.....1

II. OPINION AND ORDER, 7/6/95.....30

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICAELINA ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93 C 1123
	)	
JOHN O. BUTLER COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Micaelina Ortiz filed a complaint against defendant John O. Butler Company ("Butler") alleging retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII") 42 U.S.C. Sec. 2000(e) et seq. (Count I), and termination in violation of the Age

Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. Sec. 621 et seq. (Count II). Defendant Butler has filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.[1] For the reasons stated below, defendant's motion for summary judgment is denied as to Count I and granted as to Count II.

BACKGROUND

Defendant Butler is a manufacturer and distributor of oral hygiene products.

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[1]Defendant has also filed a motion to strike portions of the affidavits of both plaintiff and Marie Robles, a former employee of Butler, arguing that certain statements are hearsay or based on speculation. The court finds that defendant's motion to strike is moot because plaintiff has filed amended affidavits curing the problems that defendant raised in its motion.

Plaintiff was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992. Plaintiff claims that she was terminated in retaliation for complaints she made about the working conditions at Butler and because of her age. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on November 30, 1992.[2]

Plaintiff alleges that during her tenure at Butler she was exposed to a hostile work environment. Plaintiff alleges that she was sexually harassed by her immediate supervisor, Frank Williams. Plaintiff claims that her supervisor

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[2]See Complaint, Exhibit A.

continuously made lewd remarks to her such as "Hello beautiful legs, when are we going out" or "when are you going to let me come to your apartment." In addition, plaintiff alleges that her group leader, Earl Phillips, would intimidate workers through the use of foul, intimidating language, derogatory ethnic remarks, name calling and threats.

Plaintiff alleges that she, along with other Butler employees, asked both Williams and the President of Butler to met with them to discuss and remedy their allegedly hostile and unsatisfactory working conditions, but their requests were denied. After these request were denied, plaintiff alleges that two anonymous letters were submitted to management complaining about

the working conditions at Butler. The second letter accused Earl Phillips of "always getting fresh with the girls verbally and manually," and accused the Molding Department's supervisor, Frank Williams of knowing about Phillips' behavior but doing nothing and himself of being "fresh with us verbally."[3]

In response to these letters, Butler management decided that the company should conduct an audit of the Molding Department personnel to investigate the complaints made in the two letters. The audit consisted of Susan Bondy, Director of Human Resources, conducting individual employee interviews

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[3]See Statement of Undisputed Facts, Exhibit B.

during which the interviewer would ask questions about the employee's work environment.

At plaintiff's first interview, plaintiff stated that she had not heard anyone in management use foul language or make sexual comments. At a later interview, plaintiff denied that she was involved in the drafting of either of the two letters complaining about the working condition at Butler. In addition, at plaintiff's deposition she again denied being involved in the drafting of either letter. Plaintiff, however, now admits in an affidavit filed with the court in response to defendant's motion for summary judgment to having participating in the drafting of the second letter. Plaintiff states that

she lied at her interview and deposition about her involvement in the drafting of the second letter because she was physically afraid of Mr. Phillips and was worried about being fired if she confessed her role.[4]

After the audit was completed, Butler accused plaintiff of intentionally and maliciously creating and disseminating false claims of sexual harassment. Defendant suspended all the employees believed to be involved in the alleged creation of the falsehoods except for plaintiff, who was terminated on April 6, 1992. Plaintiff, who was forty-four at the time of her termination, claims the reason she was terminated, while other younger employee

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[4]See Ortiz Affidavit, par. 12, 20-26.

accused of the same conduct were merely suspended and demoted, was because of her age.

ANALYSIS

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fat and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary Judgment is inappropriate when there is a dispute over facts which might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 106 S. Ct. 2505, 2510 (1986). In ruling on a motion for summary judgment the evidence of the

non-movant must be believed, and all justifiable inferences must be drawn in the non-movant's favor. Id. at 2513. This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

However, when a party bears the burden of proof on an issue, that party may not simply rest on its pleadings to defeat summary judgment, but must affirmatively demonstrate with specific factual allegations that a genuine issue of material fact exists and requires a trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). The party must do more than simply "show there is some metaphysical doubt as to the material

facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id.

I. Retaliatory Discharge Claim

Plaintiff claims that she was terminated in retaliation for complaints she made about the allegedly hostile and unsatisfactory working conditions at Butler in violation of Title VII. Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he had made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing

under this chapter.

42 U.S.C. Sec. 2000e-3(a). The Seventh Circuit applies the burden-shifting sexual discrimination analysis to retaliatory discharge claims. See Samuelson v. Durkee/French/Airwick, 976 F.2d 1111, 1114 (7th Cir. 1992). Under the burden-shifting formula, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. Id. at 1113. Once the plaintiff meets that burden, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. If the employer is able to articulate a non-discriminatory reason for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons

are merely a pretext for retaliatory discharge. Id. at 1114.

To establish a prima facie case of retaliatory discharge in violation of Title VII, plaintiff must show that: (1) she engaged in statutorily protected opposition; (2) she suffered adverse action by Butler; and (3) there is a casual link between her opposition and the adverse employment action. See Samuelson, 976 F.2d at 1114-15 (citing Collins v. Illinois 830 F.2d 692, 702 (7th Cir. 1987)). In order for the plaintiff's expression to be statutorily protected, the practice that plaintiff is challenging need not actually violate Title VII. "Instead, it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct in violation of Title

VII." Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314 (7th Cir. 1989) (citations omitted).

The Seventh Circuit has held that it is a violation of 42 U.S.C. Sec. 2000e-3(a) to fire an employee because she opposed discrimination even if she was mistaken and there was in fact no discriminatory conduct. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982).

> "The mistake must, of course, be a sincere one; and presumably it must be reasonable...for it seems unlikely that the framers of TItle VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not he fact of discrimination, that is the critical inquiry in a retaliation case."

Id.

In this case, the evidence shows that plaintiff was first suspended and then later terminated, at least in part, because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors.[5]

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[5]See Statement of Undisputed Material Facts, par\. 72-90 and Exhibit E. Defendant states that because so many employees identified plaintiff as someone who either had asked them to sign one of the letters describing the allegedly hostile work environment at Butler or who had written one of the letters, Butler management concluded that plaintiff clearly was involved in disseminating what they believed to be false claims regarding Williams and Phillips. Plaintiff was then notified that she was suspended for one day and demoted to a job in the production department with less pay "for making false statements and accusations with malicious intent." In addition, defendant states that plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harassment and to accept responsibility for her behavior.

In Darnell v. Target Stores, 16 F.3d 174, 176 (7th Cir. 1994), the Seventh Circuit held that when a district court is faced with contradicting deposition testimony and affidavit statements from the same person, the conclusory statements in an affidavit cannot create a conflict with plain admissions in deposition testimony. The court went on to state that it is proper for a district court to rely on the deposition testimony and to disregard subsequent, contradictory affidavit statements of a witness on summary judgment because, "[i]nherently depositions carry an increased level of reliability." Id.

In this case, however, even if the court accepts as true plaintiff's deposition testimony that she did not write or

disseminate the letters complaining about sexual harassment at Butler, plaintiff is still able to prove a prima facie case of retaliatory discharge because the defendant admits that it believed that plaintiff had complained of sexual harassment and acted on this belief when suspending and terminating plaintiff.

In E.E.O.C. v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993), the Sixth Circuit held that Sec. 2000e-3(a) prohibits an employer from discriminating against third-parties, who have not actually engaged in protected activity themselves, in retaliation for a co-employee's protected opposition. The court stated that although the language of Section 2000e-3(a) indicates that Congress did not consider the

possibility of allowing a retaliation claim by a party who had not engaged in protected opposition, "the very clear intent of Congress would be undermined." if third-party reprisals were tolerated. Id.

The court found that in enacting Sec. 2000e-3(a), "Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." Id. Because "tolerance of third-party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII," the court concluded that the provisions of Sec. 2000e3(a) prohibit third-party reprisals. Id. at 544. The court stated that even though the statute does no

specifically provide for a claim by a third-party who has not opposed discrimination, the majority of courts, including the Supreme Court, have been willing to construe the sections of Title VII broadly in order not to frustrate the statute's purpose which is to "prevent fear of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions.'" Id. (quoting Mitchell v. Robert DeMario Jewelry Co., 361 U.S. 288, 292, 80 S. Ct. 332, 335 (1960)).

In fact, many courts have adopted interpretations of retaliation provisions in employment statutes, including Title VII, outside the literal terms of the statute in order to effectuate Congress's purpose of forbidding retaliatory activity. Ohio Edison, 7 F.3d 545. See e.g., Sauers v.

Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (action taken against an individual in anticipation of that person engaging in protected opposition to discrimination constitutes retaliatory discharge in violation of 42 U.S.C. Sec. 2000e-3(a)). Passer v. American Chemical Soc'y, 935 F.2d 322, 330 (D.C. Cir. 1991) (former employee could maintain an action under the ADEA's anti-retaliation provision); NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586, 590 (6th Cir.), cert. denied, 439 U.S. 819 (1978) (anti-retaliation provision of the National Labor Relations Act prohibited an employer from firing an employee who refused to testify at a Board hearing despite the fact that the statute, by its terms, applied only

to employees who had "filed charges or given testimony," and did not addresses a refusal to give testimony).

The court finds that under this line of though the phrase in Sec. 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to sexual harassment. This action is no less retaliatory under then statute than an action taken because an employee actually engaged in protected opposition. In light of the purpose of Sec. 2000e-3(a)--to encourage persons to freely exercise their protected rights under Title

VII by preventing the fear of retaliation--the court finds that this form of retaliation falls within the scope of 42 U.S.C. Sec. 2000e-3(a).

If plaintiff intentionally and maliciously filed baseless charges against her supervisors as defendants argues, Title VII would not have prevented defendant from terminating plaintiff. Plaintiff has, however, presented evidence to this court indicating that her supervisors may have engaged in sexually harassing behavior.[6]

Because a genuine issue of fact exists as to whether plaintiff intentionally and maliciously filed baseless charges of sexual

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[6]See Ortiz Affidavit, par. 5 - 16 and Robles Affidavit, par. 5.

harassment against her supervisors as defendant argues, this court cannot rule as a matter of law that plaintiff has failed to prove a prima facie case of retaliatory discharge. When plaintiff's evidence is viewed in light most favorable to her, as this court must do on summary judgment, a reasonable fact finder could conclude that plaintiff reasonably believed that she challenged conduct which violated Title VII and that she was terminated for her opposition. See Holland, 883 F.2d at 1314-15. Therefore, defendant's motion for summary judgment is denied as to Count I.

II. ADEA Claim

Plaintiff also alleges that she was fired because of her age. For plaintiff to successfully prove an ADEA violation, she

must first establish that "but for" the defendant's motive to discriminate against her because of her age, she would not have been discharged. Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992). Plaintiff may prove age discrimination by either of two methods. She may present direct evidence that her age was the determining factor in her discharge, or she may employ the burden-shifting method of proof set forth by the United States Supreme Court for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), later extended by the Seventh Circuit to ADEA cases. See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992) (quoting Oxman v. WLS-TV, 846 F.2d 448, 452 (7th Cir. 1988)).

Under the burden-shifting method of proof (the method used by plaintiff in this case), plaintiff may establish a prima facie case of discrimination by showing that she was:

> (1) within a protected class (age 40 or older); (2) performing her job according to her employer's legitimate expectations; (3) the subject of a materially adverse employment action; and (4) treated less favorably than younger employees.[7]

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[7]The Seventh Circuit in Kralman v. Illinois Dept. of Veterans' Affairs, No. 93-3398, slip op. at 10 (7th Cir. April 20, 1994), rejected a bright-line test that in order to establish a prima facie case of age discrimination the plaintiff was required to show that plaintiff was replaced by a person outside of the protected class. The court recognized, however, "that there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination." Id.

Robinson v. PPG Indus., Inc., No. 92-3000, slip op. at 6 (7th Cir. May 4, 1994) (citations omitted).

"If the plaintiff succeeds in establishing a prima facie case, this creates a rebuttable presumption of discrimination, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge." Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). Once the employer has articulated non-discriminatory reasons for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons are merely a pretext for age discrimination. Id. (citing Weihaupt v. American Medical Ass'n, 874 F.2d 419, 426-27

(7th Cir. 1989)).

To establish that defendant's justification is a pretext, plaintiff must show: 1) that a discriminatory reason more likely motivated the employer; or 2) that the employer's reasons are unworthy of credence. See Anderson v. Stauffer Chem. Co., 965 F.2d 397, 402 (7th Cir. 1992). Plaintiff may demonstrate that defendant's reasons are unworthy of credence in any of three ways: 1) by showing that the reasons have no basis in facts; (2) by showing that the reasons did not actually motivate plaintiff's discharge; or (3) by showing that the reasons were insufficient grounds for plaintiff's discharge. Weihaupt, 874 F.2d at 428.

In this case, plaintiff has chosen to

prove her ADEA claim under the burden-shifting method. Because this court finds defendant's reasons for plaintiff's discharge not to be a pretext for age discrimination, plaintiff's establishment of a prima facie case as to her discharge is inconsequential. The evidence in this case clearly shows that plaintiff was first suspended and later discharged because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors and plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment. Plaintiff does not dispute this evidence, but in fact relies on it as a basis for her retaliatory discharge claim.

Plaintiff has offered no evidence

indicating that plaintiff's age was a factor in her termination. The evidence clearly shows that two other younger employees (one in her early forties and the other in his late twenties) accused of the same conduct were merely suspended and demoted instead of being terminated because, unlike plaintiff, they acknowledged their involvement in writing the letters accusing their supervisors of sexual harassment and affirmed their loyalty to the company.[8] The court therefore finds that the defendant is entitled to summary judgment in its favor on Count II of plaintiff's complaint because plaintiff has not presented sufficient

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[8]See Statement of Undisputed Material Facts, par. 82-85.

evidence to this court which suggests that age was a factor in her discharge or which shows that defendant's reasons for plaintiff's discharge were a pretext for age discrimination.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is DENIED as to Count I and GRANTED as to Count II. Defendant's motion to strike is MOOT. The parties are strongly urged to discuss the settlement of this case and report on the status hereof on June 27, 1994 at 10 a.m.

ENTER:

_____
JAMES F. HOLDERMAN
United States District Judge

DATED: May 26, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICAELINA ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93 C 1123
	)	
JOHN O. BUTLER COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Micaelina Ortiz filed a complaint against defendant John O. Butler Company ("Butler") alleging retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. Sec. 2000(e) et seq. Presently before the court is defendant

Butler's motion for summary judgment based on mootness of plaintiff's claim. For the reasons stated below, defendant's motion for summary judgment is granted.

BACKGROUND

The following facts are undisputed by the parties. Defendant Butler is a manufacturer or oral hygiene products. Plaintiff was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992. Plaintiff claims that she was terminated in retaliation for complaints she made about being sexually harassed by her immediate supervisor, Frank Williams and her group leader, Earl Phillips. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on November

30, 1992.[1]

In mid-March, 1992, two anonymous letters were submitted to Butler's management complaining about the working conditions in the Molding Department at Butler.[2] The letters contained in various accusations against the Molding Department supervisors including that the employees were reprimanded with obscenities and threatened with mental and verbal abuse.[3] In response to these letters, Butler management conducted an audit of the Molding Department

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[1]See Complaint, Exhibit A.

[2]Uncontested Facts, par. 10-16.

[3]Id.

personnel to investigate the complaints made in the two letters. The audit consisted of Susan Bondy, Director of Human Resources, and William Spangler, Director of Operations, jointly conducting individual interviews of the Molding Department employees over a two week period. The interview consisted of questions about the employee's work environment in general and any incidents of sexual harassment.[4]

During the audit the employees did not confirm the allegations of discrimination made in the two letters. While several employees complained about Phillips' harsh language and Williams' passive supervision of Phillips, each of the first-shift employ-

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[4] Id., at par. 28-29.

ees, including Plaintiff, specifically denied that any of the supervisors ever had discriminated against them or made sexual comments to them or to others.[5]

In addition, during their audit interviews several employees identified plaintiff as having written one of the two anonymous letters, having asked them to sign the letter, or having asked them to lie about incidents of sexual harassment during the audit interviews so that their supervisors would be fired. In order to investigate these accusations, Bondy and Spangler conducted a follow-up interview with plaintiff.

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[5]At plaintiff's first interview, plaintiff stated that she had not heard anyone in management use foul language or make any sexual comments.

In the second interview, plaintiff denied that she was involved in the drafting of either of the two letters complaining about the working conditions at Butler and denied that she solicited anyone to sign either letter.[6]

After the audit was completed, Butler accused plaintiff and others of intentionally and maliciously creating and dissemi-

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[6]In addition, at plaintiff's deposition she again denied being involved in the drafting of either letter. Plaintiff, however, later admitted in an affidavit field with the court in response to defendant's first motion for summary judgment to having participating in the drafting of the second letter. Plaintiff stated that she lied at her interview and deposition about her involvement in the drafting of the second letter because she was physically afraid of Mr. Phillips and was worried about being fired if she confessed her role.

nating false claims of sexual harassment in order to discredit their supervisors and to get them fired. Defendant sus-pended all the employees, including plaintiff, believed to be involved in the alleged creation of the falsehoods. At individual suspension meetings these employees were advised of the one-day suspension and were asked to reflect upon their conduct and to decide whether they were committed to Butler or whether they wished to resign and receive severance pay.

After the suspension period, Bondy and Spangler again met privately with each of the three employees who had served their suspensions. The two other employees admitted their involvement in the letter writing scheme but plaintiff denied that she had

done anything. Plaintiff was then informed that because of her unwillingness to accept any responsibility for her conduct relating to the letters and her continuing inability to get along with her co-employees, her employment at Butler was terminated.

ANALYSIS

In her Supplemental Damage Statement to the Final Pretrial Order plaintiff identifies the damages which she asserts that she is entitled to recover from defendant Butler. Those damages include: 1) lost wages and benefits in the amount of $15,350.40, less the settlement of the N.L.R.B. claim in the amount of $16,000, resulting in total damages in a negative amount of $649.60; 2) "Increase Burden of Proof" in the amount of $100,000; and 3) punitive damages in the

amount of $300,000.[7]

Defendant argues that even assuming the existence of a valid claim of retaliatory discharge, plaintiff's claim should be dismissed as moot because plaintiff has no redressable injury. In support of its argument defendant contends that any damages relating to an increased burden of proof are not recoverable under Title VII, and that plaintiff is not entitled to an award of punitive damages as a matter of law because the undisputed facts cannot support a finding that Butler acted with malice or with reckless indifference to plaintiff's federally protected rights in terminating plaintiff. Therefore, defendant argues, because

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[7]Final Pretrial Order, Ex. N.

the only damages to which plaintiff may be entitled if she ultimately prevailed at trial are compensatory damages for lost wages and benefits which plaintiff has already recovered by defendant's payment of $16,000, plaintiff has nothing to gain from winning the case and her claim is moot. See Tucker v. United States Department of Commerce, 958 F.2d 1411, 1416 (7th Cir. 1992) (plaintiff must show some probability of a tangible benefit from winning the suit in order to demonstrate an Article III case or controversy).

A. "Increase Burden of Proof"

Plaintiff has filed a lawsuit against Butler in the Circuit Court of Cook County alleging negligence in connection with injuries plaintiff allegedly sustained in a

fall on Butler premises eight months after plaintiff's termination. Plaintiff argues that she is entitled to $100,000 in damages in this case due to the increased burden of proof required to successfully prove her state negligence action. In support of her argument plaintiff states that if she had not been wrongfully discharged from her employment at Butler she would be sure to recover damages as a result of her fall on the company premises as alleged in her state court complaint under existing worker's compensation law. Instead, plaintiff argues, because she was terminated eight months before her fall, she now has the greater burden of having to prove negligence on Butler's part in order to recover for her alleged injuries sustained in the fall.

Plaintiff contends she should be allowed to recover damages in this Title VII case because of the additional difficulties she has or will encounter associated with the greater burden of proof she must sustain at the trial of her case pending in the Circuit Court of Cook County.

The court rejects plaintiff's argument and finds that any damages resulting from any increased burden of proof her case in the Circuit Court of Cook County are not recoverable in this Title VII action. First, there is no causal relationship between plaintiff's fall and plaintiff's termination. Second, the amount that plaintiff seeks for any damages resulting from this increased burden of proof are based on speculation and unfounded assumptions.

Compensatory damaged under Title VII may only be recovered for any proximate consequences which can be established with requisite certainty. Plaintiff may pursue any damages she may have suffered as a result of her alleged fall in her state law negligence action in the Circuit Court of Cook County not in the Title VII action.

B. Punitive Damages

Section 102 of the Civil Rights Act of 1991, 42 U.S.C. Sec. 1981(a)(1), expanded the relief available to victims of employment discrimination by permitting plaintiffs to recover compensatory and punitive damages for certain Title VII violations, whereas only back pay and other equitable remedies had previously been available. 42 U.S.C. Sec. 1981a(a)(1);

Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1490 (1994). Although punitive damages may properly be awarded in Title VII retaliatory discharge cases, they are only appropriate in an egregious case of intentional discrimination when the defendant engaged in the unlawful employment practice with actual malice, or with reckless indifference as to indicate a wanton disregard for the rights of others. Hudson v. Soft Sheen Prods., Inc., 873 F. Supp. 132 136 (N.D. Ill. 1995) (citing S.Rep. No. 315, 101st Cong., 2d Sess. at 55 (1990)); See also, Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994). Moreover, while the amount of punitive damage award is a jury question, the preliminary question of whether the facts of a particular case

justify the imposition of punitive damages is a question of law. Id. If plaintiff fails to present any evidence of an employer's wanton misconduct, then punitive damages will not be available as a remedy for plaintiff's retaliatory discharge claim. Id.

In this case the court finds that plaintiff has failed to present any evidence that Butler terminated plaintiff's employment with actual malice or reckless indifference to plaintiff's rights. After receiving the anonymous letters complaining about the working conditions in the Molding Department, Butler management conducted an audit of the Molding Department personnel to investigate the complaints. There is no evidence in the record to support any

determination other than the audit was conducted fairly and conscientiously. During the audit, the employees including plaintiff, not only did not confirm the allegations of discrimination made in the two letters but in fact denied the allegations. Plaintiff has presented no evidence to indicate that Butler management's efforts to investigate the allegations of sexual harassment were a sham or that Butler management ever had actual knowledge of any sexual harassment by personnel in the Molding Department.

In addition, several employees identified plaintiff as having written one of the two anonymous letters, having asked them to sign the letter, or having asked them to lie about incidents of sexual

harassment during the audit interviews so that their supervisors would be fired. Based on this information, which Butler received from several employees, coupled with plaintiff's unwillingness to accept any responsibility for her conduct relating to the letters, as well as plaintiff's continuing inability to get along with her co-employees, plaintiff's employment at Butler was terminated.

Plaintiff has presented no evidence indicating that Butler's discharge of plaintiff was for any reason other than Butler's stated belief that plaintiff had intentionally filed baseless charges of sexual harassment against her supervisors in order to get her supervisors fired. Therefore, the court finds that because that

record demonstrates that Butler did not act with actual knowledge that it was violating any of plaintiff's federally protected rights or with reckless disregard of these rights in terminating plaintiff's employment with Butler, plaintiff is not entitled to an award of punitive damages as a matter of law.

Because plaintiff has received all of the relief to which she is legally entitled, the court concludes that she has no possibility of receiving a tangible benefit from proceeding to trial with this suit. Therefore, pursuant to Rule 1 of the Federal Rules of Civil Procedure which mandates that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination

of every action," the court finds that since no recovery can under the law be obtained by plaintiff and no material issue of fact remain for trial, plaintiff's Title VII action must be dismissed.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is GRANTED. All pending motions are MOOT. This case is DISMISSED IN ITS ENTIRETY.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: July 6, 1995

96-950

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No.

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1996

MICHAELINA ORTIZ,
Petitioner,

vs.

JOHN O. BUTLER COMPANY,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Andrey Bohdan Filipowicz
100 West Monroe
Suite 1401
Chicago IL 60603
312/578-1211

Attorney for Petitioner
Michaelina Ortiz

50 pp

TABLE OF CONTENTS

I. OPINION AND ORDER, 5/27/94.....1

II. OPINION AND ORDER, 7/6/95.....30

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICAELINA ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93 C 1123
	)	
JOHN O. BUTLER COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Micaelina Ortiz filed a complaint against defendant John O. Butler Company ("Butler") alleging retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII") 42 U.S.C. Sec. 2000(e) et seq. (Count I), and termination in violation of the Age

Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. Sec. 621 et seq. (Count II). Defendant Butler has filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.[1] For the reasons stated below, defendant's motion for summary judgment is denied as to Count I and granted as to Count II.

BACKGROUND

Defendant Butler is a manufacturer and distributor of oral hygiene products.

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[1]Defendant has also filed a motion to strike portions of the affidavits of both plaintiff and Marie Robles, a former employee of Butler, arguing that certain statements are hearsay or based on speculation. The court finds that defendant's motion to strike is moot because plaintiff has filed amended affidavits curing the problems that defendant raised in its motion.

Plaintiff was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992. Plaintiff claims that she was terminated in retaliation for complaints she made about the working conditions at Butler and because of her age. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on November 30, 1992.[2]

Plaintiff alleges that during her tenure at Butler she was exposed to a hostile work environment. Plaintiff alleges that she was sexually harassed by her immediate supervisor, Frank Williams. Plaintiff claims that her supervisor

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[2]See Complaint, Exhibit A.

continuously made lewd remarks to her such as "Hello beautiful legs, when are we going out" or "when are you going to let me come to your apartment." In addition, plaintiff alleges that her group leader, Earl Phillips, would intimidate workers through the use of foul, intimidating language, derogatory ethnic remarks, name calling and threats.

Plaintiff alleges that she, along with other Butler employees, asked both Williams and the President of Butler to met with them to discuss and remedy their allegedly hostile and unsatisfactory working conditions, but their requests were denied. After these request were denied, plaintiff alleges that two anonymous letters were submitted to management complaining about

the working conditions at Butler. The second letter accused Earl Phillips of "always getting fresh with the girls verbally and manually," and accused the Molding Department's supervisor, Frank Williams of knowing about Phillips' behavior but doing nothing and himself of being "fresh with us verbally."[3]

In response to these letters, Butler management decided that the company should conduct an audit of the Molding Department personnel to investigate the complaints made in the two letters. The audit consisted of Susan Bondy, Director of Human Resources, conducting individual employee interviews

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[3]See Statement of Undisputed Facts, Exhibit B.

during which the interviewer would ask questions about the employee's work environment.

At plaintiff's first interview, plaintiff stated that she had not heard anyone in management use foul language or make sexual comments. At a later interview, plaintiff denied that she was involved in the drafting of either of the two letters complaining about the working condition at Butler. In addition, at plaintiff's deposition she again denied being involved in the drafting of either letter. Plaintiff, however, now admits in an affidavit filed with the court in response to defendant's motion for summary judgment to having participating in the drafting of the second letter. Plaintiff states that

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accused of the same conduct were merely suspended and demoted, was because of her age.

ANALYSIS

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fat and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary Judgment is inappropriate when there is a dispute over facts which might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 106 S. Ct. 2505, 2510 (1986). In ruling on a motion for summary judgment the evidence of the

non-movant must be believed, and all justifiable inferences must be drawn in the non-movant's favor. Id. at 2513. This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

However, when a party bears the burden of proof on an issue, that party may not simply rest on its pleadings to defeat summary judgment, but must affirmatively demonstrate with specific factual allegations that a genuine issue of material fact exists and requires a trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). The party must do more than simply "show there is some metaphysical doubt as to the material

facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) (footnote omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id.

I. Retaliatory Discharge Claim

Plaintiff claims that she was terminated in retaliation for complaints she made about the allegedly hostile and unsatisfactory working conditions at Butler in violation of Title VII. Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he had made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing

under this chapter.

42 U.S.C. Sec. 2000e-3(a). The Seventh Circuit applies the burden-shifting sexual discrimination analysis to retaliatory discharge claims. See Samuelson v. Durkee/French/Airwick, 976 F.2d 1111, 1114 (7th Cir. 1992). Under the burden-shifting formula, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. Id. at 1113. Once the plaintiff meets that burden, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. If the employer is able to articulate a non-discriminatory reason for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons

are merely a pretext for retaliatory discharge. Id. at 1114.

To establish a prima facie case of retaliatory discharge in violation of Title VII, plaintiff must show that: (1) she engaged in statutorily protected opposition; (2) she suffered adverse action by Butler; and (3) there is a casual link between her opposition and the adverse employment action. See Samuelson, 976 F.2d at 1114-15 (citing Collins v. Illinois 830 F.2d 692, 702 (7th Cir. 1987)). In order for the plaintiff's expression to be statutorily protected, the practice that plaintiff is challenging need not actually violate Title VII. "Instead, it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct in violation of Title

VII." Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1314 (7th Cir. 1989) (citations omitted).

The Seventh Circuit has held that it is a violation of 42 U.S.C. Sec. 2000e-3(a) to fire an employee because she opposed discrimination even if she was mistaken and there was in fact no discriminatory conduct. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982).

> "The mistake must, of course, be a sincere one; and presumably it must be reasonable...for it seems unlikely that the framers of TItle VII would have wanted to encourage the filing of utterly baseless charges by preventing employers from disciplining the employees who made them. But it is good faith and reasonableness, not he fact of discrimination, that is the critical inquiry in a retaliation case."

Id.

In this case, the evidence shows that plaintiff was first suspended and then later terminated, at least in part, because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors.[5]

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[5]See Statement of Undisputed Material Facts, par\. 72-90 and Exhibit E. Defendant states that because so many employees identified plaintiff as someone who either had asked them to sign one of the letters describing the allegedly hostile work environment at Butler or who had written one of the letters, Butler management concluded that plaintiff clearly was involved in disseminating what they believed to be false claims regarding Williams and Phillips. Plaintiff was then notified that she was suspended for one day and demoted to a job in the production department with less pay "for making false statements and accusations with malicious intent." In addition, defendant states that plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harassment and to accept responsibility for her behavior.

In Darnell v. Target Stores, 16 F.3d 174, 176 (7th Cir. 1994), the Seventh Circuit held that when a district court is faced with contradicting deposition testimony and affidavit statements from the same person, the conclusory statements in an affidavit cannot create a conflict with plain admissions in deposition testimony. The court went on to state that it is proper for a district court to rely on the deposition testimony and to disregard subsequent, contradictory affidavit statements of a witness on summary judgment because, "[i]nherently depositions carry an increased level of reliability." Id.

In this case, however, even if the court accepts as true plaintiff's deposition testimony that she did not write or

disseminate the letters complaining about sexual harassment at Butler, plaintiff is still able to prove a prima facie case of retaliatory discharge because the defendant admits that it believed that plaintiff had complained of sexual harassment and acted on this belief when suspending and terminating plaintiff.

In E.E.O.C. v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993), the Sixth Circuit held that Sec. 2000e-3(a) prohibits an employer from discriminating against third-parties, who have not actually engaged in protected activity themselves, in retaliation for a co-employee's protected opposition. The court stated that although the language of Section 2000e-3(a) indicates that Congress did not consider the

possibility of allowing a retaliation claim by a party who had not engaged in protected opposition, "the very clear intent of Congress would be undermined." if third-party reprisals were tolerated. Id.

The court found that in enacting Sec. 2000e-3(a), "Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation." Id. Because "tolerance of third-party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII," the court concluded that the provisions of Sec. 2000e3(a) prohibit third-party reprisals. Id. at 544. The court stated that even though the statute does no

specifically provide for a claim by a third-party who has not opposed discrimination, the majority of courts, including the Supreme Court, have been willing to construe the sections of Title VII broadly in order not to frustrate the statute's purpose which is to "prevent fear of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions.'" Id. (quoting Mitchell v. Robert DeMario Jewelry Co., 361 U.S. 288, 292, 80 S. Ct. 332, 335 (1960)).

In fact, many courts have adopted interpretations of retaliation provisions in employment statutes, including Title VII, outside the literal terms of the statute in order to effectuate Congress's purpose of forbidding retaliatory activity. Ohio Edison, 7 F.3d 545. See e.g., Sauers v.

Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (action taken against an individual in anticipation of that person engaging in protected opposition to discrimination constitutes retaliatory discharge in violation of 42 U.S.C. Sec. 2000e-3(a)). Passer v. American Chemical Soc'y, 935 F.2d 322, 330 (D.C. Cir. 1991) (former employee could maintain an action under the ADEA's anti-retaliation provision); NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586, 590 (6th Cir.), cert. denied, 439 U.S. 819 (1978) (anti-retaliation provision of the National Labor Relations Act prohibited an employer from firing an employee who refused to testify at a Board hearing despite the fact that the statute, by its terms, applied only

to employees who had "filed charges or given testimony," and did not addresses a refusal to give testimony).

The court finds that under this line of though the phrase in Sec. 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to sexual harassment. This action is no less retaliatory under then statute than an action taken because an employee actually engaged in protected opposition. In light of the purpose of Sec. 2000e-3(a)--to encourage persons to freely exercise their protected rights under Title

VII by preventing the fear of retaliation--the court finds that this form of retaliation falls within the scope of 42 U.S.C. Sec. 2000e-3(a).

If plaintiff intentionally and maliciously filed baseless charges against her supervisors as defendants argues, Title VII would not have prevented defendant from terminating plaintiff. Plaintiff has, however, presented evidence to this court indicating that her supervisors may have engaged in sexually harassing behavior.[6]

Because a genuine issue of fact exists as to whether plaintiff intentionally and maliciously filed baseless charges of sexual

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[6]See Ortiz Affidavit, par. 5 - 16 and Robles Affidavit, par. 5.

harassment against her supervisors as defendant argues, this court cannot rule as a matter of law that plaintiff has failed to prove a prima facie case of retaliatory discharge. When plaintiff's evidence is viewed in light most favorable to her, as this court must do on summary judgment, a reasonable fact finder could conclude that plaintiff reasonably believed that she challenged conduct which violated Title VII and that she was terminated for her opposition. See Holland, 883 F.2d at 1314-15. Therefore, defendant's motion for summary judgment is denied as to Count I.

II. ADEA Claim

Plaintiff also alleges that she was fired because of her age. For plaintiff to successfully prove an ADEA violation, she

must first establish that "but for" the defendant's motive to discriminate against her because of her age, she would not have been discharged. Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992). Plaintiff may prove age discrimination by either of two methods. She may present direct evidence that her age was the determining factor in her discharge, or she may employ the burden-shifting method of proof set forth by the United States Supreme Court for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), later extended by the Seventh Circuit to ADEA cases. See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992) (quoting Oxman v. WLS-TV, 846 F.2d 448, 452 (7th Cir. 1988)).

Under the burden-shifting method of proof (the method used by plaintiff in this case), plaintiff may establish a prima facie case of discrimination by showing that she was:

> (1) within a protected class (age 40 or older); (2) performing her job according to her employer's legitimate expectations; (3) the subject of a materially adverse employment action; and (4) treated less favorably than younger employees.[7]

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[7]The Seventh Circuit in Kralman v. Illinois Dept. of Veterans' Affairs, No. 93-3398, slip op. at 10 (7th Cir. April 20, 1994), rejected a bright-line test that in order to establish a prima facie case of age discrimination the plaintiff was required to show that plaintiff was replaced by a person outside of the protected class. The court recognized, however, "that there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination." Id.

Robinson v. PPG Indus., Inc., No. 92-3000, slip op. at 6 (7th Cir. May 4, 1994) (citations omitted).

"If the plaintiff succeeds in establishing a prima facie case, this creates a rebuttable presumption of discrimination, and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge." Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). Once the employer has articulated non-discriminatory reasons for plaintiff's discharge, the burden shifts back to the employee to show that the employer's reasons are merely a pretext for age discrimination. Id. (citing Weihaupt v. American Medical Ass'n, 874 F.2d 419, 426-27

(7th Cir. 1989)).

To establish that defendant's justification is a pretext, plaintiff must show: 1) that a discriminatory reason more likely motivated the employer; or 2) that the employer's reasons are unworthy of credence. See Anderson v. Stauffer Chem. Co., 965 F.2d 397, 402 (7th Cir. 1992). Plaintiff may demonstrate that defendant's reasons are unworthy of credence in any of three ways: 1) by showing that the reasons have no basis in facts; (2) by showing that the reasons did not actually motivate plaintiff's discharge; or (3) by showing that the reasons were insufficient grounds for plaintiff's discharge. Weihaupt, 874 F.2d at 428.

In this case, plaintiff has chosen to

prove her ADEA claim under the burden-shifting method. Because this court finds defendant's reasons for plaintiff's discharge not to be a pretext for age discrimination, plaintiff's establishment of a prima facie case as to her discharge is inconsequential. The evidence in this case clearly shows that plaintiff was first suspended and later discharged because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors and plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment. Plaintiff does not dispute this evidence, but in fact relies on it as a basis for her retaliatory discharge claim.

Plaintiff has offered no evidence

indicating that plaintiff's age was a factor in her termination. The evidence clearly shows that two other younger employees (one in her early forties and the other in his late twenties) accused of the same conduct were merely suspended and demoted instead of being terminated because, unlike plaintiff, they acknowledged their involvement in writing the letters accusing their supervisors of sexual harassment and affirmed their loyalty to the company.[8] The court therefore finds that the defendant is entitled to summary judgment in its favor on Count II of plaintiff's complaint because plaintiff has not presented sufficient

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[8]See Statement of Undisputed Material Facts, par. 82-85.

evidence to this court which suggests that age was a factor in her discharge or which shows that defendant's reasons for plaintiff's discharge were a pretext for age discrimination.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is DENIED as to Count I and GRANTED as to Count II. Defendant's motion to strike is MOOT. The parties are strongly urged to discuss the settlement of this case and report on the status hereof on June 27, 1994 at 10 a.m.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: May 26, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICAELINA ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93 C 1123
	)	
JOHN O. BUTLER COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiff Micaelina Ortiz filed a complaint against defendant John O. Butler Company ("Butler") alleging retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 ("Title VII"), 42 U.S.C. Sec. 2000(e) et seq. Presently before the court is defendant

Butler's motion for summary judgment based on mootness of plaintiff's claim. For the reasons stated below, defendant's motion for summary judgment is granted.

BACKGROUND

The following facts are undisputed by the parties. Defendant Butler is a manufacturer or oral hygiene products. Plaintiff was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992. Plaintiff claims that she was terminated in retaliation for complaints she made about being sexually harassed by her immediate supervisor, Frank Williams and her group leader, Earl Phillips. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter on November

30, 1992.[1]

In mid-March, 1992, two anonymous letters were submitted to Butler's management complaining about the working conditions in the Molding Department at Butler.[2] The letters contained in various accusations against the Molding Department supervisors including that the employees were reprimanded with obscenities and threatened with mental and verbal abuse.[3] In response to these letters, Butler management conducted an audit of the Molding Department

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[1]See Complaint, Exhibit A.

[2]Uncontested Facts, par. 10-16.

[3]Id.

personnel to investigate the complaints made in the two letters. The audit consisted of Susan Bondy, Director of Human Resources, and William Spangler, Director of Operations, jointly conducting individual interviews of the Molding Department employees over a two week period. The interview consisted of questions about the employee's work environment in general and any incidents of sexual harassment.[4]

During the audit the employees did not confirm the allegations of discrimination made in the two letters. While several employees complained about Phillips' harsh language and Williams' passive supervision of Phillips, each of the first-shift employ-

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[4]Id., at par. 28-29.

ees, including Plaintiff, specifically denied that any of the supervisors ever had discriminated against them or made sexual comments to them or to others.[5]

In addition, during their audit interviews several employees identified plaintiff as having written one of the two anonymous letters, having asked them to sign the letter, or having asked them to lie about incidents of sexual harassment during the audit interviews so that their supervisors would be fired. In order to investigate these accusations, Bondy and Spangler conducted a follow-up interview with plaintiff.

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[5]At plaintiff's first interview, plaintiff stated that she had not heard anyone in management use foul language or make any sexual comments.

In the second interview, plaintiff denied that she was involved in the drafting of either of the two letters complaining about the working conditions at Butler and denied that she solicited anyone to sign either letter.[6]

After the audit was completed, Butler accused plaintiff and others of intentionally and maliciously creating and dissemi-

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[6]In addition, at plaintiff's deposition she again denied being involved in the drafting of either letter. Plaintiff, however, later admitted in an affidavit field with the court in response to defendant's first motion for summary judgment to having participating in the drafting of the second letter. Plaintiff stated that she lied at her interview and deposition about her involvement in the drafting of the second letter because she was physically afraid of Mr. Phillips and was worried about being fired if she confessed her role.

nating false claims of sexual harassment in order to discredit their supervisors and to get them fired. Defendant sus-pended all the employees, including plaintiff, believed to be involved in the alleged creation of the falsehoods. At individual suspension meetings these employees were advised of the one-day suspension and were asked to reflect upon their conduct and to decide whether they were committed to Butler or whether they wished to resign and receive severance pay.

After the suspension period, Bondy and Spangler again met privately with each of the three employees who had served their suspensions. The two other employees admitted their involvement in the letter writing scheme but plaintiff denied that she had

done anything. Plaintiff was then informed that because of her unwillingness to accept any responsibility for her conduct relating to the letters and her continuing inability to get along with her co-employees, her employment at Butler was terminated.

ANALYSIS

In her Supplemental Damage Statement to the Final Pretrial Order plaintiff identifies the damages which she asserts that she is entitled to recover from defendant Butler. Those damages include: 1) lost wages and benefits in the amount of $15,350.40, less the settlement of the N.L.R.B. claim in the amount of $16,000, resulting in total damages in a negative amount of $649.60; 2) "Increase Burden of Proof" in the amount of $100,000; and 3) punitive damages in the

amount of $300,000.[7]

Defendant argues that even assuming the existence of a valid claim of retaliatory discharge, plaintiff's claim should be dismissed as moot because plaintiff has no redressable injury. In support of its argument defendant contends that any damages relating to an increased burden of proof are not recoverable under Title VII, and that plaintiff is not entitled to an award of punitive damages as a matter of law because the undisputed facts cannot support a finding that Butler acted with malice or with reckless indifference to plaintiff's federally protected rights in terminating plaintiff. Therefore, defendant argues, because

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[7]Final Pretrial Order, Ex. N.

the only damages to which plaintiff may be entitled if she ultimately prevailed at trial are compensatory damages for lost wages and benefits which plaintiff has already recovered by defendant's payment of $16,000, plaintiff has nothing to gain from winning the case and her claim is moot. See Tucker v. United States Department of Commerce, 958 F.2d 1411, 1416 (7th Cir. 1992) (plaintiff must show some probability of a tangible benefit from winning the suit in order to demonstrate an Article III case or controversy).

A. "Increase Burden of Proof"

Plaintiff has filed a lawsuit against Butler in the Circuit Court of Cook County alleging negligence in connection with injuries plaintiff allegedly sustained in a

fall on Butler premises eight months after plaintiff's termination. Plaintiff argues that she is entitled to $100,000 in damages in this case due to the increased burden of proof required to successfully prove her state negligence action. In support of her argument plaintiff states that if she had not been wrongfully discharged from her employment at Butler she would be sure to recover damages as a result of her fall on the company premises as alleged in her state court complaint under existing worker's compensation law. Instead, plaintiff argues, because she was terminated eight months before her fall, she now has the greater burden of having to prove negligence on Butler's part in order to recover for her alleged injuries sustained in the fall.

Plaintiff contends she should be allowed to recover damages in this Title VII case because of the additional difficulties she has or will encounter associated with the greater burden of proof she must sustain at the trial of her case pending in the Circuit Court of Cook County.

The court rejects plaintiff's argument and finds that any damages resulting from any increased burden of proof her case in the Circuit Court of Cook County are not recoverable in this Title VII action. First, there is no causal relationship between plaintiff's fall and plaintiff's termination. Second, the amount that plaintiff seeks for any damages resulting from this increased burden of proof are based on speculation and unfounded assumptions.

Compensatory damaged under Title VII may only be recovered for any proximate consequences which can be established with requisite certainty. Plaintiff may pursue any damages she may have suffered as a result of her alleged fall in her state law negligence action in the Circuit Court of Cook County not in the Title VII action.

B. Punitive Damages

Section 102 of the Civil Rights Act of 1991, 42 U.S.C. Sec. 1981(a)(1), expanded the relief available to victims of employment discrimination by permitting plaintiffs to recover compensatory and punitive damages for certain Title VII violations, whereas only back pay and other equitable remedies had previously been available. 42 U.S.C. Sec. 1981a(a)(1);

Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1490 (1994). Although punitive damages may properly be awarded in Title VII retaliatory discharge cases, they are only appropriate in an egregious case of intentional discrimination when the defendant engaged in the unlawful employment practice with actual malice, or with reckless indifference as to indicate a wanton disregard for the rights of others. Hudson v. Soft Sheen Prods., Inc., 873 F. Supp. 132 136 (N.D. Ill. 1995) (citing S.Rep. No. 315, 101st Cong., 2d Sess. at 55 (1990)); See also, Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994). Moreover, while the amount of punitive damage award is a jury question, the preliminary question of whether the facts of a particular case

justify the imposition of punitive damages is a question of law. Id. If plaintiff fails to present any evidence of an employer's wanton misconduct, then punitive damages will not be available as a remedy for plaintiff's retaliatory discharge claim. Id.

In this case the court finds that plaintiff has failed to present any evidence that Butler terminated plaintiff's employment with actual malice or reckless indifference to plaintiff's rights. After receiving the anonymous letters complaining about the working conditions in the Molding Department, Butler management conducted an audit of the Molding Department personnel to investigate the complaints. There is no evidence in the record to support any

determination other than the audit was conducted fairly and conscientiously. During the audit, the employees including plaintiff, not only did not confirm the allegations of discrimination made in the two letters but in fact denied the allegations. Plaintiff has presented no evidence to indicate that Butler management's efforts to investigate the allegations of sexual harassment were a sham or that Butler management ever had actual knowledge of any sexual harassment by personnel in the Molding Department.

In addition, several employees identified plaintiff as having written one of the two anonymous letters, having asked them to sign the letter, or having asked them to lie about incidents of sexual

harassment during the audit interviews so that their supervisors would be fired. Based on this information, which Butler received from several employees, coupled with plaintiff's unwillingness to accept any responsibility for her conduct relating to the letters, as well as plaintiff's continuing inability to get along with her co-employees, plaintiff's employment at Butler was terminated.

Plaintiff has presented no evidence indicating that Butler's discharge of plaintiff was for any reason other than Butler's stated belief that plaintiff had intentionally filed baseless charges of sexual harassment against her supervisors in order to get her supervisors fired. Therefore, the court finds that because that

record demonstrates that Butler did not act with actual knowledge that it was violating any of plaintiff's federally protected rights or with reckless disregard of these rights in terminating plaintiff's employment with Butler, plaintiff is not entitled to an award of punitive damages as a matter of law.

Because plaintiff has received all of the relief to which she is legally entitled, the court concludes that she has no possibility of receiving a tangible benefit from proceeding to trial with this suit. Therefore, pursuant to Rule 1 of the Federal Rules of Civil Procedure which mandates that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination

of every action," the court finds that since no recovery can under the law be obtained by plaintiff and no material issue of fact remain for trial, plaintiff's Title VII action must be dismissed.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is GRANTED. All pending motions are MOOT. This case is DISMISSED IN ITS ENTIRETY.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: July 6, 1995